3 1761 03594 8777

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

**A SELECTION OF CASES
ILLUSTRATIVE OF
THE LAW OF CONTRACT**

CAMBRIDGE UNIVERSITY PRESS

C. F. CLAY, MANAGER

LONDON : FETTER LANE, E.C. 4

LONDON : STEVENS AND SONS, LTD.,
119 and 120 Chancery Lane, W.C. 2

NEW YORK : THE MACMILLAN CO.

BOMBAY

CALCUTTA

MADRAS

} MACMILLAN AND CO., LTD.

TORONTO : THE MACMILLAN CO. OF
CANADA, LTD.

TOKYO : MARUZEN-KABUSHIKI-KAISHA

ALL RIGHTS RESERVED

3sf
A SELECTION OF CASES
ILLUSTRATIVE OF
THE LAW OF CONTRACT

(BASED ON THE COLLECTION OF G. B. FINCH)

BY

COURTNEY STANHOPE KENNY, LL.D., F.B.A.

EMERITUS PROFESSOR OF LAW IN THE UNIVERSITY OF CAMBRIDGE;
CHAIRMAN OF CAMBS. QUARTER SESSIONS;
LATE M.P. FOR BARNSELY

249083
24.11.30

CAMBRIDGE
AT THE UNIVERSITY PRESS

1922

2229

CHURCH

P R E F A C E

THE late Mr G. B. Finch, after long experience at the bar, in London, accepted in Cambridge the duties of an academical teacher of law. Wishing to adopt the methods of the Harvard Law School, which he had visited, he prepared and published a collection of judicial decisions on the law of Contract. After his death, a second edition of this work, enhanced in value by the care and learning of Mr R. T. Wright and Professor W. W. Buckland, was issued in 1896. It has long been out of print, and even second-hand copies of it can seldom be obtained. The desirability of its reproduction has thus been obvious. But, under present commercial conditions, a volume of dimensions so large could not be published except at a prohibitive cost.

Under these circumstances, the Cambridge University Press, as proprietors of the copyright, decided that the book should again be made accessible; but in a form so abridged that its price should not place it beyond the reach of the ordinary student. The Syndics, with the kind and ready consent of Mr Wright and Professor Buckland, entrusted to me the preparation of the proposed work.

I have omitted only those very few decisions that seem to have lost their authority or their interest. By the generous permission of the Incorporated Council of Law Reporting, I have been enabled to insert various cases that have been decided since the edition of 1896 was published. Most of the cases contained in that edition I have abridged greatly; but without much detriment, I hope, to their educational value. To some of the judgments I have added brief annotations; to explain or to develop the doctrines they establish. And, as questions of the Interpretation of Contracts arise so frequently in legal practice, I have introduced a chapter upon that subject. I have also added a few decisions upon the Assignment of Contracts. The net result is to give the student, in a volume of moderate dimensions, the pith of the facts and law of some two hundred and forty reported cases.

In abridging the reports, I have been careful to preserve in each a clear presentation (either by the unsuccessful counsel or by a dissentient judge) of the arguments in support of that view which ultimately did *not* prevail. For unless the student realises equally clearly both sides of the dispute, the point adjudged is apt to seem

to him a mere foregone conclusion; and thus his perusal of the case, though it affords him information, gives him no mental discipline. A professed study of cases too often degenerates into a study of the mere headnotes. The peculiar advantage of case-study is then lost; and each Report becomes merely a fragment—and a diffuse one—of textbook law. Yet litigation would not have been indulged in had there not been a doubt. It is by actively thinking out the proverbial “competition of opposite analogies,” which created this doubt, that a legal habit of mind is formed—a possession still more valuable to the busy practitioner than even legal erudition itself. Of the practising lawyer’s art we may well repeat what Marshal Foch has said of the art of military strategy, “It cannot be acquired from abstract rules, but only from studying the concrete details of recorded instances.”

C. S. K.

DOWNING COLLEGE,

January, 1922.

CONTENTS

CHAPTER I

	PAGE
OFFER AND ACCEPTANCE	1

CHAPTER II

FORM OF CONTRACT

I. CONTRACT UNDER SEAL	73
II. STATUTE OF FRAUDS	83

CHAPTER III

CONSIDERATION

I. NECESSITY OF CONSIDERATION	121
II. NATURE AND REALITY OF CONSIDERATION	127
III. ADEQUACY OF CONSIDERATION	176

CHAPTER IV

CAPACITY OF PARTIES

I. POLITICAL STATUS	185
II. INFANTS	192
III. CORPORATIONS	208
IV. LUNATIC AND DRUNKEN PERSONS	214
V. MARRIED WOMEN	217

CHAPTER V

REALITY OF CONSENT

I. MISTAKE	223
II. MISREPRESENTATION	242
III. FRAUD	268
IV. UNDUE INFLUENCE	286

CHAPTER VI

UNLAWFUL AGREEMENTS	299
-------------------------------	-----

CHAPTER VII

	PAGE
AGENCY	323

CHAPTER VIII

DISCHARGE

I. BY OPERATION OF CONDITION SUBSEQUENT	353
II. BY NEW AGREEMENT	362
III. BY IMPOSSIBILITY	379
IV. BY BREACH	382

CHAPTER IX

REMEDIES FOR BREACH OF CONTRACT

I. DAMAGES	407
II. SPECIFIC PERFORMANCE	416

CHAPTER X

INTERPRETATION OF CONTRACTS	441
---------------------------------------	-----

CHAPTER XI

THE ASSIGNMENT OF CONTRACTS	497
---------------------------------------	-----

TABLE OF CASES

- Adams *v.* Lindsell, 52
 Adderley *v.* Dixon, 416
 Agra & Masterman's Bank, *In re*, 22
 Allcard *v.* Skinner, 292
 Alliance Bank *v.* Broom, 134
 Anonymous (21 H. 7), 407
 Armstrong *v.* Stokes, 336
 Ashbury R. C. Co. *v.* Riche, 208
 Asiatic Banking Corporation, *Ex parte*, 22
 Atkinson *v.* Denby, 314

 Bache *v.* Proctor, 454
 Bailey *v.* Sweeting, 113
 Bain *v.* Fothergill, 410
 Bainbridge *v.* Firmstone, 178
 Bannerman *v.* White, 242
 Barclay *v.* Pearson, 308
 Baxter, *Ex parte*, 494
 Bennett *v.* White, 505
 Bettini *v.* Gye, 403
 Bidder *v.* Bridges, 157
 Bilborough *v.* Holmes, 375
 Bingham *v.* Bingham, 235
 ✓ Birkmyr *v.* Darnell, 102
 Birrell *v.* Dryer, 490
 Bolton *v.* Lambert, 325
 Boulton *v.* Jones, 230—
 Brandt's Sons *v.* Dunlop, 499
 Bret *v.* J. S., 177
 Britain *v.* Rossiter, 110
 Brooks *v.* Haigh, 178
 Brown *v.* Byrne, 479
 Burke *v.* S. E. Ry. Co., 35
 Burnard *v.* Haggis, 200
 Byrne *v.* Van Tienhoven, 66

 Calder *v.* Dobell, 343
 Callisher *v.* Bischoffsheim, 136
 Campbell, *In re*, 312
 Carlill *v.* Carbolic S. B. Co., 18
 Chandler *v.* Webster, 381
 Chatenay *v.* Brazilian Co., 448
 Cherry *v.* Heming, 108
 Clarke *v.* Cuckfield Union, 79
 Clayton *v.* Lord Nugent, 474
 Coles *v.* Hulme, 452
 Collen *v.* Wright, 329
 Collins *v.* Blantarn, 299
 Cooke *v.* Eshelby, 348
 Cooke *v.* Oxley, 44

 County Hotel *v.* L. N. W. Ry., 509
 Couturier *v.* Hastie, 231 —
 Crowley *v.* Swindles, 488
 ✓ Cundy *v.* Lindsay, 226 —

 Denton *v.* G. N. Ry. Co., 14
 Deposit L. A. Co. *v.* Ayscough, 285
 Derry *v.* Peek, 261
 Di Sora *v.* Phillipps, 446
 Dickinson *v.* Dodds, 49
 Ditcham *v.* Worrall, 204
 Dunlop *v.* Higgins, 54
 Dunlop *v.* New Garage, 459
 Dunlop *v.* Selfridge, 124
 Durham *v.* Robertson, 506
 Dutton *v.* Thompson, 290

 Eastern C. Ry. Co. *v.* Marriage, 486
 Eastwood *v.* Kenyon, 143
 Edwards *v.* Weeks, 362
 Edwards *v.* Wickwar, 256
 Eliason *v.* Henshaw, 30 —
 England *v.* Davidson, 165
 Ertel *v.* Rio Tinto, 188

 Felthouse *v.* Bindley, 27
 Fenton *v.* Emblers, 106
 Fetherston *v.* Hutchinson, 299
 Fisher *v.* Richardson, 131
 Fitch *v.* Snedaker, 3
 Flight *v.* Bolland, 434
 Flight *v.* Booth, 252
 Flight *v.* Reed, 172
 Foakes *v.* Beer, 153
 Foster *v.* Dawber, 364
 Foster *v.* Mackinnon, 223
 Fowle *v.* Freeman, 84
 Freeman *v.* Cooke, 246
 Frost *v.* Knight, 391

 Gervais *v.* Edwards, 420
 Gibbons *v.* Proctor, 5
 Goddard *v.* O'Brien, 151
 Godwin *v.* Francis, 83
 Good *v.* Cheesman, 158
 Goss *v.* Lord Nugent, 368
 Great Northern Ry. Co. *v.* Witham, 180

 Hadley *v.* Baxendale, 411
 Haigh *v.* Brooks, 178

- Hardinge v. Cobden, 435
 Hare & O'More's Contract, *In re*, 437
 Harris v. Nickerson, 17
 Harris v. Rickett, 470
 Harris' Case, 56
 Hart v. Standard, 462
 Hartley v. Ponsonby, 148
 Harvey v. Facey, 1
 Harvey v. Young, 268
 Head v. Tattersall, 355
 Hebb's Case, 48
 Henderson v. Arthur, 467
 Henderson v. Stevenson, 32
 Henthorn v. Fraser, 63
 Hewet v. Painter, 465
 Hickman v. Haynes, 371
 Hitchman v. Avery, 39
 Hoadly v. McLaine, 97
 Holman v. Johnson, 301
 Horsfall v. Thomas, 281
 Household Insurance v. Grant, 59
 Hunt v. Hunt, 425
 Hyde v. Wrench, 43

 Imperial Land Co., *In re*, 56
 Imperial Loan Co. v. Stone, 214
 Irvine v. Watson, 341

 Jeffery v. Walton, 469
 Jennings v. Rundall, 198
 Johnstone v. Milling, 394
 Jones v. Ashburnham, 132
 Jones v. Humphreys, 502

 Kaye v. Dutton, 169
 Kearley v. Thomson, 317
 Kelner v. Baxter, 326
 Kemble v. Farren, 456
 Kemp v. Baerselman, 507
 King v. Gillett, 363
 Kingston v. Preston, 400
 Krell v. Henry, 379

 Lampleigh v. Brathwait, 168
 Langden v. Stokes, 362
 Larsen v. Sylvester, 484
 Laythoarp v. Bryant, 85
 Lazarus v. Andrade, 418
 Leask v. Scott, 138
 Lee v. Jones, 257
 Lees v. Whitcomb, 123
 Leslie v. Sheill, 202
 Lilley v. Doubleday, 415
 London Assurance v. Mansel, 248
 Lord Dormer v. Knight, 461
 Loyd v. Lee, 131

 Lucan, *Re Earl of*, 435
 Lyle v. Richards, 441

 Main's Case, 382
 Martin v. Nutkin, 422
 Matthews v. Baxter, 216
 Mavor v. Pyne, 384
 Mersey v. Naylor, 388
 Mighell v. Sultan of Johore, 190
 Montefiori v. Montefiori, 245
 Morrell v. Frith, 444
 Morton v. Lamb, 401
 Mountstephen v. Lakeman, 102
 Munn v. Baker, 489

 National Savings Bank, *In re*, 48
 Nesbitt v. Lushington, 482
 Nichols v. Raynbred, 164
 Nordenfelt v. Maxim, 319
 Norrington v. Wright, 389
 Nugent v. Smith, 357

 Offord v. Davies, 45
 Oliver v. Hunting, 99
 Owen v. Thomas, 487

 Paddock v. Fradley, 476
 Parker v. Ibbetson, 353
 Payne v. Cave, 7
 Pearce v. Brooks, 303
 Percival v. London C. C., 182
 Pickering v. Busk, 323
 Pinnel's Case, 150
 Planché v. Colburn, 385
 Plevins v. Downing, 374
 Polhill v. Walter, 275
 Pordage v. Cole, 398
 Porter v. Freudenberg, 185
 Public Trustee v. Gray, 503
 Pym v. Campbell, 471

 Raffles v. Wichelhaus, 234
 Ramsgate V. H. Co. v. Goldsmid, 46
 Ramsgate V. H. Co. v. Montefiore, 46
 Rann v. Hughes, 121
 Raw v. Dawson, 498
 Reuss v. Picksley, 88
 Rex v. Twine, 497
 Risney v. Selby, 269
 Rodriguez v. Speyer, 187
 Rooke v. Dawson, 69
 Roscorla v. Thomas, 167
 Ryder v. Wombwell, 192

 Sanky v. Golding, 217
 Saunderson v. Piper, 493

- Schmaltz *v.* Avery, 332
 Schulze *v.* G. E. Ry. Co., 414
 Scotson *v.* Pegg, 161
 Scott *v.* Brown, 306
 Scott *v.* Littledale, 236
 Scott *v.* Morley, 217
 Shardlow *v.* Cotterell, 94
 Sidenham *v.* Worlington, 164
 Smith *v.* Hughes, 237
 Smith *v.* Reese River Co., 278
 Smith *v.* Wilson, 464
 Solly *v.* Forbes, 451
 South of Ireland Co. Co. *v.* Waddle,
 81
 Spencer *v.* Harding, 8
 Steele *v.* Hoe, 455
 Stilk *v.* Myrick, 147
 Sturlyn *v.* Albany, 176
 Sweeting *v.* Fowler, 477

 Tamplin *v.* James, 432
 Tate *v.* Williamson, 286
 Taylor *v.* Brewer, 40
 Taylor *v.* G. E. Ry. Co., 118
 Taylor *v.* Laird, 24
 Taylor *v.* Smith, 115
 Thomas *v.* Thomas, 127
 Thorpe *v.* Thorpe, 483

 Torkington *v.* Magee, 500
 Tulk *v.* Moxhay, 423
 Tweddle *v.* Atkinson, 141

 Valentini *v.* Canali, 197
 Valpy *v.* Oakeley, 408
 Vince, *In re*, 494

 Ward *v.* Hobbs, 269
 Ware *v.* Chappel, 398
 Warlow *v.* Harrison, 10
 Watkins *v.* Rymill, 37
 Webster *v.* Cecil, 430
 Week *v.* Tibbold, 40
 Westerton, *In re*, 503
 Whitwood C. Co. *v.* Hardman,
 427
 Wigglesworth *v.* Dallison, 478
 Williams *v.* Carwardine, 2
 Williams *v.* Jones, 472
 Williams *v.* Jordan, 92
 Winn *v.* Bull, 41
 Withers *v.* Reynolds, 386
 Wm. Brandt *v.* Dunlop, 499
 Wolverhampton Banking Co., *Ex*
 parte, 312

 Xenos *v.* Wickham, 73

CASES ON THE LAW OF CONTRACT

CHAPTER I

OFFER AND ACCEPTANCE

HARVEY AND ANOTHER *v.* FACEY AND OTHERS.

PRIVY COUNCIL.

L.R. [1893] A.C. 553.

[Offer—or Acceptance of Offer.]

[IN the beginning of October, 1891, negotiations took place between L. M. Facey and the Mayor and Council of Kingston, Jamaica, for the sale of an estate called Bumper Hall Pen; which Facey had offered to sell to them for the sum of £900. The offer was discussed by the Council at their meeting on the 6th of October, 1891, but its consideration deferred. On October 7th, Facey was travelling in the train from Kingston to Porus; and the appellants, a firm of solicitors in Kingston, caused a telegram to be sent addressed to him "on the train for Porus," in the following words: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid." On the same day Facey replied by telegram to the appellants in the following words: "Lowest price for Bumper Hall Pen £900." On the same day the appellants replied to the last-mentioned telegram by a telegram addressed to L. M. Facey "on train at Porus" in the words following: "We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession." These telegrams were duly received by the appellants and by Facey.

The appellants instituted an action to obtain specific performance of (what they regarded as) the agreement created by the telegrams. The action was dismissed by Curran, J., on the ground that no contract had been concluded. His judgment was reversed by the Supreme Court of Jamaica, who held that a binding agreement had been proved. The defendants appealed.]

Sir Horace Davey, Q.C., for defendants. Facey's telegraphic form contained his signature; and the telegram received by the appellants contained the names of the sender and receiver written by the telegraph-clerk in the ordinary course of his business; constituting sufficient signature within the Statute of Frauds. Assuming the telegrams and telegraphic forms to be sufficient to satisfy the Statute, the Court of Appeal was right in holding that they proved a binding agreement.

* * * * *

LORD MORRIS. The first telegram asks two questions. The first question is as to the willingness of Facey to sell to the appellants; the second question asks the lowest price, and the word "telegraph" is in

its collocation addressed to that second question only. Facey replied to the second question only, and gives his lowest price. The third telegram from the appellants treats the answer of Facey, stating his lowest price, as an unconditional offer to sell to them at the price named. Their lordships cannot treat the telegram from Facey as binding him in any respect, except to the extent it does by its terms, viz., the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by Facey. The contract could only be completed if Facey had accepted the appellants' last telegram. It has been contended for the appellants that Facey's telegram should be read as saying "Yes" to the first question put in the appellants' telegram, but there is nothing to support that contention. Facey's telegram gives a precise answer to a precise question, viz., the price. The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry.

Judgment of Curran, J., restored.

[EDITOR'S NOTE. This case was followed in *Boyers v. Duke* (2 Irish Rep. [1904] 617); where Madden, J., said: "The ideas of a quotation and of an offer to sell are radically different....A manufacturer, by furnishing a quotation, invites an offer; which will be honoured or not, according to the exigencies of his business."]

MARY ANN WILLIAMS v. WILLIAM CARWARDINE.

KING'S BENCH. 1833.

4 BARNEWALL AND ADOLPHUS, 621.

[Offer by Advertisement.]

ASSUMPSIT to recover 20*l.*, which the defendant promised to pay to any person who should give such information as might lead to a discovery of the murder of Walter Carwardine. Plea, general issue.

Walter Carwardine, the brother of the defendant, was seen on the evening of the 24th of March 1831, at a public house at Hereford, and was not heard of again till his body was found on the 12th of April in the river Wye, about two miles from the city. An inquest was held on the body; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give any information which led to the apprehension of the real offender. On the 25th of April the defendant caused a handbill to be published, stating that whoever would give such information as should lead to a discovery of the murder of Walter Carwardine should, on conviction, receive a reward of 20*l.*; and any person concerned therein or privy thereto (except the party who actually committed the offence) should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was

to be made to Mr William Carwardine, Holmer, near Hereford. Soon after this, the plaintiff was severely beaten and bruised by one Williams; and on the 23rd of August 1831, believing she had not long to live, to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant, to give evidence, the law would not imply a contract by the defendant to pay her the 20*l*. Park, J., was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the 20*l*. was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced¹ by the offer of the reward, but by other motives.

Curwood now moved for a new trial. There was no promise to pay the plaintiff the sum of 20*l*. That promise could only be enforced in favour of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negated any contract on the part of the defendant with the plaintiff.

DENMAN, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives.

Rule refused.

✓ FITCH APP. v. SNEDAKER RESP.

NEW YORK COURT OF APPEALS. 1868.

38 N.Y. 248.

[Offer by Advertisement.]

WOODRUFF, J. On the 14th of October, 1859, the defendant caused a notice to be published, offering a reward of \$200... "to any person or persons who will give such information as shall lead to the apprehension and conviction of the person or persons guilty of the murder of" a certain unknown female:

¹ [EDITOR'S NOTE. But we must presume that, when giving the information, she already *knew* of the offer. For otherwise, as was remarked by Hawkins, J., in *Carlill v. Carbolic S.B. Co.*, it would be "difficult to understand how it could be said that she was party to a Contract."]

On the 15th day of October, before the plaintiffs had seen or heard of the offer of this reward, one Fee was arrested and put in jail; and though not in terms so stated, the case warrants the inference that, by means of the evidence given by the plaintiffs on his trial and their efforts to procure testimony, Fee was convicted.

This action is brought to recover the reward so offered. On the trial the plaintiffs proved the publication of the notice, and then proposed to prove that they gave information before the notice was known to them, which led to the arrest of Fee. This evidence was excluded. The plaintiffs then offered to prove that, with a view to this reward, they spent time and money, made disclosures to the district attorney, to the grand jury and to the court on the trial after Fee was in jail, and that, without their effort, evidence, and exertion, no indictment or conviction could have been had. This evidence was excluded.

The court thereupon directed a nonsuit.

It is entirely clear that, in order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction. That is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, until conviction followed: both are conditions precedent. No one could therefore claim the reward, who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and however clear that, had the information been concealed or suppressed, there could have been no conviction. This is according to the plain terms of the offer of the reward, and is held in *Jones v. The Phoenix Bank* (8 N.Y. 228); *Thatcher v. England* (3 C.B. 254). In the last case it was distinctly held that, under an offer of reward, payable "on recovery of property stolen and conviction of the offender," a person who was active in arresting the thief and finding and restoring part of the stolen property, giving information to the magistrates, tracing to London other of the property, and producing pawnbrokers with whom the prisoner had pledged it, and who incurred much trouble and expense in bringing together witnesses for the prosecution, was not entitled to the reward, as it appeared that another person gave the first information as to the party committing the robbery¹.

In the present case, the plaintiff, after the advertisement of the defendant's offer of a reward came to his knowledge, did nothing towards procuring the arrest, nor which led thereto, for at that time Fee had already been arrested.

The cases above referred to establish that, if no information came from the plaintiffs which led to the arrest of Fee, the plaintiffs are not entitled to recover, however much the information they subsequently gave, and the efforts they made to procure evidence, may have contributed to or even have caused his conviction; and therefore evidence that it was their efforts and information which led to his conviction, was wholly immaterial (if they did not prove that they had given information which led to his apprehension), and was properly rejected....

¹. [EDITOR'S NOTE. For it was held that giving the first information constituted "the original cause" of the recovery and conviction.]

The case of *Williams v. Carwardine* (*supra*, p. 2) holds that a person who gives information according to the terms of an offered reward is entitled to the money, although it distinctly appears that the informer had suppressed the information for five months, and was led to inform, not by the promised reward, but by other motives. The court said the plaintiff had proved performance of the condition upon which the money was payable, and that established her title; that the court would not look into her motives. It does not appear by the reports of this case whether or not the plaintiff had ever seen the notice or handbill posted by the defendant, offering the reward; it does not therefore reach the precise point involved in the present appeal.

I perceive, however, no reason for applying to an offer of reward for the apprehension of a criminal any other rules than are applicable to any other offer by one, accepted or acted upon by another, and so relied upon as constituting a contract. The form of action in all such cases is *assumpsit*. The defendant is proceeded against as upon his contract to pay, and the first question is, Was there a contract between the parties? To the existence of a contract there must be mutual assent; or, in another form, offer, and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard? On the fifteenth day of October, 1859, the murderer, Fee, had, in consequence of information given by the plaintiffs, been apprehended and lodged in jail. But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon; they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it. It was prospective to those who will in the future give information, &c.

An offer cannot become a contract unless acted upon or assented to....

Judgment affirmed.

GIBBONS v. PROCTOR.

QUEEN'S BENCH DIVISION. 1891.

64 LAW TIMES N.S. 594.

[*Offer of reward—Communication.*]

THIS was a motion to set aside the nonsuit directed by the County Court Judge of Hertfordshire, and to enter the verdict for the plaintiff, in an action brought by the plaintiff, a police officer, against the defendant, Canon Proctor, to recover 25*l.*, the amount of the reward offered by the defendant, in printed handbills, published by him, to the individual who would give information leading to the conviction of the person who committed a criminal assault on a little girl fourteen years of age on the 27th May 1890. It was admitted that the plaintiff's information was the *causa causans* of the conviction, but the learned County Court judge nonsuited the plaintiff, on the ground that the offer of the reward was not issued until after the information was given.

The facts and circumstances of the case are as follows:—

On the 29th May, between ten and eleven o'clock in the morning, the defendant instructed his printers to print the handbills offering the reward, and between seven and eight o'clock on the same evening the printed handbills were delivered in a parcel to Superintendent Penn, at the police-station, and were then forwarded by him, unopened, to the neighbouring police-stations, where they were due in the ordinary course of post on the morning of the following day, the 30th May. In issuing the handbills the defendant was acting in concert with Superintendent Penn, and it was to Penn that the desired information was by the bills directed to be given.

Early in the morning of the 29th May, between two and three o'clock, the plaintiff, a police officer, whilst on his beat met a comrade, a fellow-policeman, named Coppin, who showed him his note-book containing a description of the supposed criminal. The plaintiff, recognising in that description a resemblance to a man whom he knew to be then already arrested elsewhere on another charge, told Coppin to inform Superintendent Penn that the man he wanted was at that moment in custody at Ongar. Coppin carried the news, as by the rules of the force he was bound to do, to his own immediate superior officer, Inspector Lennan, in the afternoon of the same day, the 29th May, and Lennan sent it on by that evening's post to Superintendent Penn, whom it reached on the morning of the 30th May; and thereupon Penn immediately went to Ongar, and recognised the prisoner, who, upon his trial, pleaded guilty to the assault, and was sentenced to eighteen months' imprisonment.

Wightman Wood, for defendant. Penn only distributed the handbills, and there was no publication of the promise to him. Plaintiff knew nothing of any promise, nor was any in existence at the time he took his only step in the matter. Coppin and Lennan were the agents of Penn, and the communication of the plaintiff's information, if not complete to Coppin at two a.m. on the 29th May, was, at any rate, complete to Inspector Lennan at three p.m. on that day, at which time no publication of any offer of reward had taken place. The service here being rendered before the offer was published, *Williams v. Carwardine* is no authority in this case.

DAY, J. This action is brought to recover a reward, which the defendant advertised, as payable to the person who should prosecute to conviction the perpetrator of a certain crime. The defendant published on the 29th May a handbill, in which he stated that he would give 25*l.* to any person who should give information leading to the conviction of the offender in question, such information to be given to a superintendent of police of the name of Penn. The plaintiff is a police-officer, and, in the early morning of the 29th May, the day on the afternoon of which the bill was published, but before it was published, communicated important information which led to the conviction of the offender to a comrade and fellow-policeman called Coppin, telling Coppin, as his agent, to carry the information to the proper authority. Coppin, in accordance with the rules of the force, first informed his own superior officer, Inspector Lennan, and Lennan sent on the information to Superintendent Penn. Both

Coppin and Lennan were the agents of the plaintiff to carry on a message set going by him, and it reached Penn at a time when he had notice that the person sending him such information was entitled to the reward of 25*l*. The condition was fulfilled after the publication of the handbill and the announcement therein contained of the defendant's offer of the reward to the informant.

LAWRANCE, J. I entirely agree.

Nonsuit set aside, and verdict entered for plaintiff.

[EDITOR'S NOTE. In spite of the acknowledged eminence of Mr Justice Day, this case has never commanded the general assent of the profession. It is printed here, not as an authority, but simply as useful matter for argumentative discussion.]

PAYNE v. CAVE.

KING'S BENCH. 1789.

3 TERM REPORTS, 148.

[Auction—Bidding—Revocation.]

A WORM-TUB was put up for sale at an auction. One of the conditions of sale was that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days' time, it should be put up again and resold. The defendant became the purchaser of the lot in question for 40*l*. and was requested to pay the usual deposit which he refused to do. At the trial, the plaintiff's counsel opened the case thus: There were several bidders, of whom the defendant was the last, who bid 40*l*.; the auctioneer dwelt on the bidding; on which the defendant said "why do you dwell, you will not get more." The auctioneer said that he was informed that the worm weighed at least 1300 cwt., and was worth more than 40*l*. The defendant then asked him whether he would warrant it to weigh so much; and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for 30*l*. to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion on that statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller: in the mean time the person who bid last is a conditional purchaser, if nobody bids more. Otherwise it would be in the power of any person to injure the vendor, because all the former biddings are discharged by the last, and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last outbid would have given for them. The case of *Simon v. Motivos* (3 Burr. 1921), which was mentioned at the trial, does not apply. That turned on the Statute of Frauds.

THE COURT thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentie*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

Rule refused.

SPENCER AND OTHERS v. HARDING AND OTHERS.

COMMON PLEAS. 1870.

LAW REPORTS, 5 C.P. 561.

[*Advertisement for Tenders.*]

THE declaration stated that "The defendants by their agents issued to the plaintiffs and other persons engaged in the wholesale trade, a circular in the words and figures following, that is to say, '28, King Street, Cheapside, May 17th, 1869. We are instructed to offer to the wholesale trade for sale by tender the stock in trade of Messrs G. Eilbeck & Co., of No. 1, Milk Street, amounting as per stock-book to £2503. 13s. 1d., and which will be sold at a discount in one lot. Payment to be made in cash. The stock may be viewed on the premises, up to Thursday, the 20th instant, on which day, at 12 o'clock at noon precisely, the tenders will be received and opened at our offices. Should you tender and not attend the sale, please address to us sealed and inclosed, 'Tender for Eilbeck's stock.' Stock-books may be had at our offices on Tuesday morning. Honey, Humphreys, & Co.' And the defendants offered and undertook to sell the said stock to the highest bidder for cash, and to receive and open the tenders delivered to them or their agents in that behalf, according to the true intent and meaning of the said circular: And the plaintiffs thereupon sent to the said agents of the defendants a tender for the said goods, in accordance with the said circular, and also attended the said sale at the time and place named in the said circular: And the said tender of the plaintiffs was the highest tender received by the defendants or their agents in that behalf: And the plaintiffs were ready and willing to pay for the said goods according to the true intent and meaning of the said circular: And all conditions were performed, &c., to entitle the plaintiffs to have their said tender accepted by the defendants, and to be declared the purchasers of the said goods according to the true intent and meaning of the said circular. Yet the defendants refused to accept the said tender of the plaintiffs, and refused to sell the said goods to the plaintiffs, and refused to open the said tender or proceed with the sale of the said goods, in accordance with their said offer and undertaking in that behalf, whereby the plaintiffs had been deprived of profit, &c."

Demurrer, on the ground that the count shewed no promise to accept the plaintiffs' tender or sell them the goods. Joinder....

Morgan Lloyd, for plaintiffs. The words of the circular and the averments in the declaration, taken together, disclose a contract on the part of the defendants to sell the goods to whoever should make the highest tender. This is not like the case of tenders for a building. There, the acceptance of the lowest tender is always subject to the architect's judgment as to the character and capacity of the builder. Here, the offer is to sell for cash. The allegation in the count may be sustained either by evidence of a direct promise, or by evidence of the custom of the trade....

The nearest analogy is that of advertisements offering rewards for the discovery and conviction of an offender, of which one of the leading instances is the case of *Williams v. Carwardine* (*supra*, p. 2), where Little-dale, J., says: "The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender."

WILLES, J. I am of opinion that the defendants are entitled to judgment. The action is brought against persons who issued a circular offering a stock for sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder, that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however, there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, "and we undertake to sell to the highest bidder," the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment for defendants.

[EDITOR'S NOTE. As to tenders themselves, see *G.N.R. Co. v. Witham*, *infra*, ch. III, sec. iii.]

WARLOW v. HARRISON.

EXCHEQUER CHAMBER. 1859.

1 ELLIS AND ELLIS, 295, 309.

[Auction—Sale without reserve.]

THE declaration stated that the defendant carried on the business of an auctioneer, and was employed to sell by public auction divers horses: that he advertised that the said intended sale by auction would take place on Thursday the 24th day of June, 1858, at No. 1, Cheapside, Birmingham; and that there would be sold by auction (amongst other horses) a certain horse, that is to say "the property of a gentleman, without reserve, *Janet Pride*, a brown mare, without white, five years old, by *Iago* out of *Stormy Petrel*; for performances see *Racing Calendar*." That the plaintiff attended the said sale by auction, and was the highest bidder for the said mare so advertised to be sold without reserve; and that the defendant became and was the agent of the plaintiff, to complete the contract, on behalf of the plaintiff, for the purchase of the said mare, but wholly omitted and refused so to do; whereby the plaintiff was deprived of the benefit of the said contract, and was put to divers expenses. And he claimed £150.

Pleas: 1. Not Guilty; 2. That the plaintiff was not the highest bidder at the said sale as alleged; 3. That the defendant did not become the plaintiff's agent as alleged.

On the trial, before Cockburn, C. J., at the last Warwick Assizes, the facts appeared to be...that at the auction the mare *Janet Pride* was put up for sale by the defendant as auctioneer. And, after several biddings made for her, some being made on behalf of the plaintiff by a friend of his, the mare went up to 59 guineas: the plaintiff then bid 60 guineas for her; and immediately there was a bid made over him of 61 guineas, by Mr Henderson, the owner of the mare. The defendant, on the 61 guineas being so bid as aforesaid, nodded to the plaintiff, to see if he would bid any more: but the plaintiff, having been then informed that the owner of the mare had made the last bidding of 61 guineas, shook his head and refused to make any further bid; and the defendant thereupon knocked down the mare to Mr Henderson, the owner, for 61 guineas, and entered his name as purchaser in the sale book....The same day, plaintiff tendered to the defendant the sum of 63 pounds in sovereigns as and for the price of the mare, and demanded her; the defendant refused to receive the money or to deliver up the mare to the plaintiff, stating, at the same time, that he had knocked her down to the highest bidder, and he could not interfere in the matter. He also said Henderson was the highest bidder. There was evidence that certain printed conditions of sale were posted about the defendant's repository where the sale took place, and that it was the practice to read them before the sales there. One is as follows.

"1. The highest bidder to be the buyer; and, if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer may declare the purchaser."

A verdict was taken for the plaintiff, damages 5*l.* 5*s.*; and leave was given to the plaintiff to amend the declaration if the Court should think fit; and to the defendant leave was given to move as after mentioned.

Mellor obtained a rule to enter a verdict for defendant, or a nonsuit, on the grounds: First, that no such duty as alleged devolved upon the defendant under the circumstances of the case; secondly, that the defendant was not the agent of the plaintiff to complete the sale, not being bound by any duty or contract so to do; thirdly, that there was no contract with the plaintiff in point of fact which it became the duty of the defendant to complete; fourthly, that, by the bidding of the owner of the horse of a larger sum than that bid by the plaintiff, any authority on the part of the owner to sell the horse to the plaintiff was revoked; fifthly, that it was the duty of the plaintiff, if he disputed the bid of the owner of the horse, to have disputed such bidding pursuant to the conditions upon which the sale was to be conducted.

LORD CAMPBELL, C.J. We feel bound to give judgment for the defendant, on the short ground that the plaintiff's allegations as to the agency of the defendant and the duty of the defendant to complete the contract on behalf of the plaintiff are not substantiated....

If, after an article put up to be sold by auction is knocked down to the highest bidder, the auctioneer, at his request, signs a memorandum of the agreement to purchase, this is a sufficient memorandum of the agreement to bind the purchaser. But the auctioneer is the agent of the purchaser for this purpose only; and he becomes so only when there is a contract of sale by the acceptance of the bidding, which is usually declared when the hammer is knocked down. Then the purchaser authorizes the auctioneer to sign the memorandum. But, till the hammer falls, the auctioneer is exclusively the agent of the vendor....*Payne v. Cave* (*supra*, p. 7) decided that bidding at an auction, instead of being a conditional purchase, is a mere offer; that the auctioneer is the agent of the vendor; that the assent of both parties is necessary to the contract; that the assent is signified by knocking down the hammer; and that, till then, either party may retract. This is quite inconsistent with the notion of a conditional purchase by a bidding, and with the notion of there being any personal promise by the auctioneer to the bidder that the bidding of an intending purchaser shall absolutely be accepted by the vendor. The vendor himself and the bidder being respectively free till the hammer is knocked down, the auctioneer cannot possibly be previously bound. At this auction, the mare never was knocked down to the plaintiff; and the relation of principal and agent between him and defendant never had commenced.

We are not called upon to say whether there is any or what remedy on the conditions of sale against the vendor who violates the condition that the article shall be *bonâ fide* sold without reserve: but we are clear that the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has been determined by the vendor before the hammer has been knocked down.

Nonsuit entered.

EXCHEQUER CHAMBER. 1859.

THE plaintiff appealed.

Macaulay for the appellant (plaintiff below)....There was in this case a contract between the auctioneer and the bidder. [MARTIN, B. Does the auctioneer do more than say that the owner has directed him to sell without reserve?] He professes to have adopted those directions. [MARTIN, B. Why could not the owner stop the sale?] He might do so, but not by such a trick as this. There can be no dispute but that, if the article is once knocked down to a bonâ fide bidder, the auctioneer is his agent. But, when the sale is "without reserve," the agency commences at the bidding, which gives the bidder a right till divested by a higher bonâ fide bidder. The auctioneer is thus, successively, the agent of every bidder, conditionally upon there being no higher bonâ fide bidding. The Court below relied upon *Payne v. Cave*. But there it was not part of the conditions of sale that the bidding should be "without reserve": and the bidder had therefore a discretion to withdraw his bidding at any time before the hammer was down: had the sale been "without reserve" he would have been bound by his bidding. The consideration on which the auctioneer enters into the contract is the increase of commission which will accrue to him from each successive bidding.

Field, contra. The declaration alleges that the defendant was retained and employed to sell; that is, by the owner: and then it alleges that the defendant became the agent of the plaintiff, the bidder, to complete the sale. On that agency the declaration, which complains of a breach of duty, is founded. But at what time did such agency commence? All that the defendant has done, in the way of undertaking on his part, is to publish an announcement that he is employed by the owner to sell....

[BYLES, J. May it not be said that the advertisement of the defendant amounted to a promise that he would act in compliance with the terms of the advertisement towards any one who also acted on those terms?] The words in the advertisement "without reserve" cannot affect the question as suggested on the other side. Those words might have disqualified the owner from availing himself, directly or indirectly, of his own bid: but how can they make the auctioneer the agent of the bidder? [*Macaulay*. According to the terms of the reservation, the declaration may be altered.] But it has not been altered; and the breach complained of is the neglect of duty as agent. Nor, if the action were shaped as an action for fraud, would the evidence support it: there is no proof that the defendant knew that the owner was bidding....

Macaulay, in reply....The notion of a revocation of authority, after a bidding made upon an announcement that the sale was to be without reserve, cannot be supported. [BRAMWELL, B. If there were such a revocation, perhaps the auctioneer should have said: "Stop: the sale is not without reserve; my authority is revoked."]

MARTIN, B. This is to be understood as the judgment of my brothers *Byles* and *Watson* and myself....

Upon the pleadings as they stand, we think the judgment of the Court of Queen's Bench is right, and that the defendant is entitled to the

verdict upon the issue on the third plea. But there is power given to the Court to amend; and we think we ought to exercise it largely...in order to determine the real question in controversy between the parties in the existing suit. Upon the facts of the case, it seems to us that the plaintiff is entitled to recover.

In this, as in most cases of sales by auction, the owner's name was not disclosed: he was a concealed principal. The name of the auctioneers, of whom the defendant was one, alone was published; and the sale was announced by them to be "without reserve." This means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not; *Thornett v. Haines* (15 M. & W. 367). We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time table. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him; *Denton v. Great Northern Railway Company* (*infra*, p. 14). Upon the same principle, it seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve....Neither does it seem to us material whether the owner bid with the knowledge or privity of the auctioneer. We think the auctioneer has contracted that the sale shall be without reserve; and that the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time when the property is under the hammer, or it be the last bid upon which the article is knocked down; in either case the sale is not "without reserve," and the contract of the auctioneer is broken. We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority: but he does so at his peril; and, if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified....

As to the first condition of sale, Mr Henderson could not be the buyer: he was the owner. And, if it were material, there is ample evidence that the defendant knew him to be so. Indeed we think he ought not to have taken his bid, but to have refused it; stating, as his reason, that the sale was "without reserve." We feel inclined to differ with the view of the Court of Queen's Bench in that we rather think the bid of Mr Henderson was not a revocation of the defendant's authority as auctioneer.

For these reasons, if the plaintiff think fit to amend his declaration, he, in our opinion, is entitled to the judgment of the Court.

WILLES, J. My brother *Bramwell* and myself do not dissent from the judgment which has been pronounced. But we prefer to rest our decision, as to the amendment, upon the ground that the defendant undertook to have, and yet there was evidence that he had not, authority to sell without reserve. The result is the same.

Judgment of Court of Queen's Bench to be affirmed; unless the parties elect to enter a *stet processus* [as they did], or the plaintiff amend his declaration; in which latter case, a new trial to be had.

[EDITOR'S NOTE. The plaintiff had a valid claim against this auctioneer who was selling for an *undisclosed* principal. But he should not have stated it as arising from negligence in the execution of an Agency, for no agency existed. It arose from the breach of a Contract; whether that contract were an agreement to sell to the highest bidder, or (as the minority of the Exchequer Chamber preferred to say) a warranty that he had authority so to sell. The former alternative was questioned in *Mainprice v. Westley* (6 B. & S. 420). Had the auctioneer's advertisement of a sale without reserve been fraudulently issued without any intention of carrying it out, he would have been liable, in an action of tort for this Deceit, to any one who had incurred expense on the faith of it; see *Richardson v. Sylvester*, L.R. 9 Q.B. 34.

The student may read with advantage the elaborate note on *Warlow v. Harrison* in Halsbury's *Laws of England*, i. 511. See *Rainbow v. Howkins* (L.R. [1904] 2 K.B. 322) that every auctioneer has an implied authority to sell without reserve; which cannot be limited without notice to buyer.]

DENTON v. GREAT NORTHERN RAILWAY COMPANY.

QUEEN'S BENCH. 1856.

5 E. & B. 860.

[*Railway Company—Time Tables.*]

The plaintiff being in London in March, 1855, and having business at Peterborough on 25th March, and at Hull on the 26th March, consulted the printed time tables issued in the usual way by the defendants for that month. In these a train was advertised to leave London at 5 P.M. and reach Peterborough about 7 P.M., and thence to proceed, amongst other towns, to Hull, to arrive there about midnight. At the bottom of the time tables was the following notice: "The Companies make every exertion that the trains shall be punctual, but their arrival or departure at the times stated will not be guaranteed, nor will the Companies hold themselves responsible for delay or any consequences arising therefrom." The time tables advertising this train were, till after 26th March, exhibited by the defendants at their stations, where the plaintiff had seen them, and were circulated. On the 25th March the plaintiff had one.

The plaintiff, having made his arrangements on the faith of these time tables, went down to Peterborough by an early train, transacted business at Peterborough, and went to the defendants' station at Peterborough in due time to take a ticket to Hull by the evening train so advertised. But there was no such train to Hull; nor had there been one during any part of the month of March. The explanation of this was that the whole line of railway from Peterborough to Hull was not the property of the defendants, their line ending at Askerne on the route from Peterborough to Hull. [They had had arrangements with other railway companies for the conveyance of their passengers from Askerne to Hull. But late in February, before] the publication by the defendants of their time tables, but after they had been printed, the North Eastern Railway Company gave notice to the defendants that, after the 1st day of March, the train to Hull would be discontinued. The defendants nevertheless made no alteration in their time tables, which were issued for March. The plaintiff was thus misled as above stated. In consequence of the absence of this train the plaintiff could not get to Hull in time for an

appointment which he had made for the 26th March, and sustained damage to the amount of 5*l.* 10*s.* It did not appear in or by the time tables whether the train from Peterborough to Hull was or was not entirely under the control of the defendants. The question for the opinion of the Court was, Whether the plaintiff was entitled to recover.

* * * * *

Hill, for defendant. First, there is no Contract....No doubt, if the plaintiff had obtained a ticket for Hull, the defendants would have been answerable for not taking him there; for the ticket would have been a contract. But the question here is whether they have agreed to give a ticket to any one who may come. In the cases as to rewards (*Williams v. Carwardine*, p. 2, *supra*) the advertisement is a request to do certain work for which the advertiser promises to pay. But this is no more than a statement that they intend to run a train. If it is a contract, it is an absolute contract; and, whatever happens, they must run a train as soon as practicable, even though there were a convulsion of nature. The consequences may be alarming: if a ship is once advertised as being about to sail as a general ship, the owner has, according to this, made a contract with every one who chooses to come to offer goods or freight, that he shall not change its destination. A mere publication of an intention is not a contract....Secondly, as to the supposed False Representation. It appears by the case that when the time tables were printed they were accurate enough; there was no legal duty on them to print new time tables.

LORD CAMPBELL, C.J....Is it a good contract in law? The consideration is—a prejudice to the person who makes his arrangements with a view to the fulfilment of the contract, and comes to the station on the faith of it. Is it not then within the principle of those cases in which it has been held that an action lies on a contract to pay a reward? There the promise is to the public at large, exactly as it is here; it is in effect the same as if made to each individual conditionally; and, on an individual fulfilling the condition, it is an absolute contract with him, and he may sue....Reliance is placed on the cases which decide that an absolute contract must be fulfilled whatever happens; which, it is said, shews that there cannot be a contract here. But I think there might be implied exceptions. A carrier by sea excepts the perils of the sea. It may be from the nature of this contract that the perils of the railroad are excepted. I see no inconvenience likely to arise from holding this a contract. It is put, as an example of inconvenience, that a shipowner who has advertised that his ship is bound for *Calcutta* as a general ship and that he will take on board goods brought to her, would be liable to an action if when goods were brought on the faith of the advertisement he said he had got a better freight, and was now bound for *Jamaica*; but I see no reason why he should not be liable.

But on the other ground there is no doubt. The statement in the time tables was untrue; and was made so as to be what the law calls a fraudulent representation. It was not the original printing that was blameable: but, after notice that the train was withdrawn, the defendants

continue, down to the 25th March, to issue these tables. Was not that a representation that there was such a train? And, as they knew it had been discontinued for some time, was it not a false representation? It is all one as if a person, duly authorized by the Company, had, knowing it was not true, said to the plaintiff: "there is a train from Milford Junction to Hull at that hour." The plaintiff believes this, acts upon it, and sustains loss.

WIGHTMAN, J. It seems to me that the publication of these time tables amounted to a promise to any one of the public who would come to the station and pay for a ticket, that he shall have one by the train at seven. It is said that this will make the Company liable though there be inevitable accidents. But the provision at the foot of the time tables protects the Company in cases of delay by accident, though the proviso does not apply to the present case where the train is altogether taken off.

But, whether there be a contract or not, the defendants are liable as having induced the plaintiff by a continued and knowingly false representation to believe that there was a train at seven to Hull, which he, believing, acted upon to his prejudice. All the essentials for an action for a false representation are here. The representation is untrue; it is known by the persons making it to be untrue; it is calculated to induce the plaintiff to act; and he, believing it, is induced to act accordingly.

CROMPTON, J....I am much inclined to think that the Company are liable also on the ground that they have committed a breach of their duty as public carriers. A public carrier of goods must carry according to his public profession; I think, however, that there has been no decision that carriers of passengers are under the same obligation: though in *Story on Bailments*, s. 591, it is said they are¹. I cannot doubt that the defendants publicly professed to be carriers of passengers by this train; and therefore I am inclined to think an action would lie on that ground.... But I am not prepared to say that there is a contract. Where a reward is offered, it is generally offered to procure a service, which is performed by the party claiming the reward. I never was able to see any good reason why in such cases he might not sue for work and labour done at the request of the defendant. But in the present case, I doubt if the labour of coming to the station really is part of the consideration at all. I doubt whether the promise here in fact was in consideration of coming to the station....

I am clearly of opinion that the action lies as for a false representation.

Judgment for plaintiff.

¹ [EDITOR'S NOTE. This point remained still undecided until 1909; when in *Clarke v. West Ham Corporation* (L.R. [1909] 2 K.B. 858), Farwell, L.J., and Kennedy, L.J., adopted Story's doctrine. They held that carriers of passengers *must*, like carriers of goods, "carry according to their profession." Thus they are bound "to act as common carriers in respect to all persons (not in an unfit condition) for whom they have accommodation, on having the legal fare tendered to them."]

HARRIS v. NICKERSON.

QUEEN'S BENCH. 1873.

L.R. 8 Q.B. 286.

[*Auctioneer, liability of—Withdrawal of goods advertised for sale.*]

CASE on appeal from the City of London Court.

The following were the particulars of claim. This action is brought to recover 2*l.* 16*s.* 6*d.* for two days loss of time by the plaintiff, at the special instance and request of the defendant, on the plaintiff attending at a public sale by auction, advertised by the defendant to be held at Bury St Edmunds, on the 14th of August, 1872, for the disposal of certain goods under bills of sale; on the faith of which the plaintiff duly attended, and was ready to purchase in pursuance of such request and public notification aforesaid. But the defendant, in breach thereof, did suddenly and without notice withdraw the said goods from the sale; by which the plaintiff lost not only his two days time and railway fare, but the additional expense of two days board and lodging.

At the hearing it was proved that the sale was advertised as stated by the plaintiff, and catalogues distributed. By the catalogue it appeared that "Under bills of sale" certain brewing materials, plant, and office furniture, would be sold by auction by Mr Nickerson (the defendant), at Bury St Edmunds, on Monday, 12th of August, 1872, and following days. The conditions were the usual conditions; the first being "The highest bidder to be the buyer."

It was also proved that the plaintiff had a commission to purchase at the sale the "office furniture," advertised to be sold. The plaintiff went to Bury St Edmunds and attended the sale, and purchased lots other than those described in the catalogue as "office furniture." The articles described as "office furniture" were not put up for sale, but were withdrawn.

The Judge gave judgment for the plaintiff; but, at the request of the defendant, gave him leave to appeal.

Macrae Moir, for the defendant, contended that it was clear that the mere advertising of a sale did not amount to a contract with anybody who attended the sale that any particular lot, or class of articles advertised, would be put up for sale. He referred to *Warlow v. Harrison* (*supra*, p. 10); and *Payne v. Cave* (*supra*, p. 7).

Warton, for the plaintiff, contended that the advertisement of the sale by the defendant was a contract by him with the plaintiff, who attended the sale on the faith of it, that he would sell the property advertised according to the conditions; and the withdrawal of the property after the plaintiff had incurred expenses in consequence of the advertisement was a breach of such contract. A reasonable notice of the withdrawal, at all events, ought to have been given. He likened the case to that of an advertisement of a reward, which, though general in its inception, becomes a promise to the particular person who acts upon it before it has been withdrawn. He referred to *Spencer v. Harding* (L.R. 5 C.P. 561).

* * * * *

QUAIN, J. To uphold the judge's decision it is necessary to go to the extent of saying that when an auctioneer issues an advertisement of the sale of goods, if he withdraws any part of them without notice, the persons attending may all maintain actions against him. In the present case, it is to be observed that the plaintiff bought some other lots; but it is said he had a commission to buy the furniture, either the whole or in part, and that therefore he has a right of action against the defendant. Such a proposition seems to be destitute of all authority; and it would be introducing an extremely inconvenient rule of law to say that an auctioneer is bound to give notice of the withdrawal or to be held liable to everybody attending the sale. When a sale is advertised as without reserve, and a lot is put up and bid for, there is ground for saying, as was said in *Warlow v. Harrison*, that a contract is entered into between the auctioneer and the highest bonâ fide bidder. But that has no application to the present case; here the lots were never put up, and no offer was made by the plaintiff, nor promise made by the defendant (except by his advertisement that certain goods would be sold). It is impossible to say that that is a contract with everybody attending the sale, and that the auctioneer is to be liable for their expenses if any single article is withdrawn. *Spencer v. Harding*, which was cited by plaintiff's counsel, as far as it goes, is a direct authority against his proposition.

ARCHIBALD, J....This is an attempt on the part of the plaintiff to make a mere declaration of intention a binding contract. He has utterly failed to shew authority or reason for his proposition....If a false and fraudulent representation had been made out, it would have been quite another matter.

Judgment for defendant.

CARLILL v. THE CARBOLIC SMOKE BALL COMPANY.

QUEEN'S BENCH DIVISION. 1892.

L.R. [1892] 2 Q.B. 484.

[Offer by advertisement—Performance of condition.]

THE defendants, the proprietors of a medical preparation called "The Carbolic Smoke Ball," inserted the following advertisement: "100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions supplied with each ball. 1000*l.* is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter. During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball. One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10*s.* post free."

The plaintiff, having read that advertisement, on the faith of it bought one of the defendants' carbolic smoke balls, and used it as directed three times a day, from November 20 till January 17, 1892,

when she was attacked by influenza. She thereupon brought this action to recover the 100*l.* promised.

[For the defendants it was contended as follows.

(1) There was no contract. The advertisement was not an offer, but a mere expression of Intention. The vagueness of "after having used the ball" shews this; there is no limit of time, a person would be included who took influenza ten years after using the ball. The plaintiff gave no consideration: *Williams v. Carwardine* does not apply; for here the plaintiff rendered no service, and she had no control over her catching the influenza. *Denton v. G.N.R. Co.* does not apply; for here the plaintiff did no overt act that notified her acceptance of the offer.

(2) If there were a contract, it was legally void. (a) Under 8 & 9 Vict. c. 109, as being a contract by way of wagering; and (b) under 14 Geo. III, c. 48, s. 2 as being a policy of insurance made "without inserting the names of the persons on whose account such policy is made"; and also (c) as being contrary to public policy.]

* * * * *

HAWKINS, J....The offer or proposal in the advertisement, coupled with the performance by the plaintiff of the condition, created a contract on the part of the defendants to pay the 100*l.* upon the happening of the event mentioned in the proposal. It seems to me that the contract may be thus described. In consideration that the plaintiff would use the carbolic smoke ball three times daily for two weeks according to printed directions supplied with the ball, the defendants would pay to her 100*l.* if after having so used the ball she contracted the epidemic known as influenza....I notice that in the present case the promise is of 100*l.* reward; but the substance of the offer is to pay the named sum as compensation for the failure of the article to produce the guaranteed effect of the two weeks' daily use as directed. Such daily use was sufficient legal consideration to support the promise.

This brings me to a second question, whether the advertisement requires to be stamped as an agreement before it can be admitted in evidence....Whether a written or printed document falls within this requirement depends upon its character at the time it was committed to writing, or print, and issued. If at the time no concluded contract had been arrived at by the contracting parties, it certainly could not in any sense be treated as an agreement, nor could it be treated as a memorandum of an agreement, for there could be no memorandum of an agreement which had no existence. No document requires an agreement stamp unless it amounts to an agreement, or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing, the offer and acceptance together amount to an agreement; but, if accepted by parol, such acceptance does not convert the offer into an agreement nor into a memorandum of an agreement, unless, indeed, after the acceptance,

something is said or done by the parties to indicate that in the future it is to be so considered.

A third question is whether the contract is a contract by way of gaming or wagering within 8 & 9 Vict. c. 109, s. 18, which renders such contracts null and void. I think it is not. It is not easy to define with precision the narrow line of demarcation which separates a wagering contract from an ordinary contract. But, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose; whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.

It is also essential that there should be mutuality in the contract. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance (those of one party being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent it from becoming so), this want of mutuality would destroy the wagering element of the contract and leave it enforceable by law as an ordinary one: see *Grizewood v. Blane* (11 C.B. 526); *Thacker v. Hardy* (4 Q.B.D. 685).

One other matter ought to be mentioned, namely, that in construing a contract with a view to determining whether it is a wagering one or not, the Court will receive evidence in order to arrive at the substance of it, and will not confine its attention to the mere words in which it is expressed. For a wagering contract may be sometimes concealed under the guise of language which, on the face of it, if words were only to be considered, might constitute a legally enforceable contract. Such was the case in *Brogden v. Marriott* (3 Bing. N.C. 88), in which under the guise of a contract for the sale by the defendant to the plaintiff of a horse, at a price to depend on the event of a trial of its speed and staying power, there was concealed a mere bet of the defendant's horse to 200*l.* that the horse within a month should trot eighteen miles within an hour. The defendant's horse having failed to accomplish the task set him, plaintiff claimed the horse at a nominal price of 1*s.* The nature of this contract was transparent to any person of ordinary intelligence, and the plaintiff in vain argued that it was a bona fide conditional bargain. The Court held it to be nothing more nor less than a mere wagering contract prohibited by statute.

In the present case an essential element of a wagering contract is absent. The event upon which the defendants promised to pay the 100*l.*

depended upon the plaintiff's contracting the epidemic influenza after using the ball; but, on the happening of that event, the plaintiff alone could derive benefit. On the other hand, if that event did not happen, the defendants could gain nothing, for there was no promise on the plaintiff's part to pay or do anything if the ball had the desired effect. When the contract first of all came into existence (i.e., when the plaintiff had performed the consideration for the defendants' promise), in no event could the plaintiff lose anything, nor could the defendants win anything.

As to the objection that this contract (if any) was one of insurance, and invalid for non-compliance with the statute 14 Geo. III, c. 48, s. 2, the simple answer is that the section relates only to a policy which is a written document. It cannot apply to a contract like the present, which is created by a written proposal accepted by the fulfilment by the plaintiff of the conditions attached to the offer. I do not feel it necessary to discuss the question whether the contract is one of insurance, which kind of contract Blackburn, J., in *Wilson v. Jones* (L.R. 2 Ex. at p. 150), thus describes: "A policy is, properly speaking, a contract to indemnify the insured, in respect of some interest which he has, against the perils which he contemplates it will be liable to." My present opinion is that it does not amount to such a contract, and certain I am that neither of the parties so intended it.

In the pleadings I find a further defence that the contract was contrary to public policy; but the learned counsel for the defendants was unable to point out to me any grounds for such a contention other than those I have already discussed.

I therefore direct a verdict to be entered for the plaintiff for 100l., and judgment accordingly with costs.

Judgment for the plaintiff.

[The defendants appealed; but in vain; the proceedings in the Court of Appeal are reported in L.R. [1893] 1 Q.B. 256. The following two points deserve attention.]

BOWEN, L.J....It is said that there was no notification of the acceptance of the contract. As an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Consensus is necessary according to English law to make a contract. But as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so. Where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to follow the indicated method of acceptance. And if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification....If I advertise to the world that my dog is lost, and that anybody who brings the dog to a

particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition.

A further argument for the defendants was that this was a *nudum pactum*—that there was no consideration for the promise. The definition of “consideration” adopted by Tindal, C.J., in *Laythoarp v. Bryant* (3 Scott, 250), is this: “Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant.” Can it be said here that if the person who reads this advertisement applies, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils thrice daily for a whole fortnight, he is doing nothing at all—that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration)? Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

In re AGRA AND MASTERMAN'S BANK.

Ex parte ASIATIC BANKING CORPORATION.

CHANCERY. 1867.

L.R. 2 CH. APP., 391.

[*Bills of Exchange—Open¹ Letter of Credit—Promise to accept Bills.*]

THIS was an appeal by the official liquidator of the Asiatic Banking Corporation from an order of Vice-Chancellor Wood, refusing to admit a claim made against the estate of the Agra and Masterman's Bank, Limited, in respect of certain bills of exchange.

On the 31st of October, 1865, Agra and Masterman's Bank gave to Dickson, Tatham, & Co., a letter of credit, addressed to them, which was in the following terms: “No. 394. You are hereby authorized to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit, No. 394, of the 31st of October, 1865.”

¹ [EDITOR'S NOTE. “Open” letters of credit are unconditional ones; as opposed to those that are “Documentary,” i.e. which have attached to them a condition, e.g. that, when the bill of exchange is presented for acceptance, a bill of lading shall accompany it.]

In May, 1866, Dickson, Tatham, & Co., drew bills on the Agra and Masterman's Bank, under this letter, for £6000, and sold them to the agent of the Asiatic Banking Corporation. The agent, on taking the bills, duly indorsed particulars on the letter of credit. The Agra and Masterman's Bank stopped payment before the bills were presented for acceptance. Both banks were now being wound up, and the official liquidator of the Asiatic Banking Corporation, who were still the holders of the bills, carried in a claim for their amount under the winding-up of the Agra and Masterman's Bank. This was opposed on the ground that Dickson, Tatham, & Co. were indebted to Agra and Masterman's Bank to an amount exceeding what was due on the bills.

* * * * *

Dickinson, Q.C. for the official liquidator of Agra and Masterman's Bank:

There is no agency; the letter of credit was given for the benefit of Tatham & Co., who were not acting on behalf of the bank. *Johnson v. Collings* (L.R. 2 Eq. 674) shews that a promise to accept a future bill is no acceptance, and that is all the letter amounts to in the present case.... The case is distinguishable from *Denton v. Great Northern Railway* (*supra*, p. 14) and cases of that class, in this—that there the advertisement was issued to all the world; here the letter was addressed to an individual firm.

[LORD JUSTICE CAIRNS:—Was not the letter intended to be shewn?]

No doubt; but then we get upon the question of equitable, not legal liability. The transferees become equitable assignees of the benefit of a contract between the bank and Tatham & Co., and must take, subject to the same equities as their assignors, i.e., subject to the state of account between the bank and Tatham & Co. No doubt the liability to these equities might be excluded by apt words, but there is nothing of the kind in the instrument. *Jeffryes v. Agra and Masterman's Bank* (L.R. 2 Eq. 674) supports the claim to set off. Shewing the letter is no more than telling the persons who take bills that the bank has promised Tatham & Co. to accept them; the liberty to communicate this promise cannot extend its effect, which is only to give Tatham & Co. a right of action if it is broken.

* * * * *

SIR H. M. CAIRNS, L.J....

It is contended that the letter, being in form addressed to Dickson, Tatham, & Co., constituted a contract with no one but them; and that this contract, even if assignable in equity, could not be assigned otherwise than subject to all equities between Dickson, Tatham, & Co. and the Agra and Masterman's Bank.

The letter is a general invitation issued by the Agra and Masterman's Bank, through Dickson, Tatham, & Co., to all persons to whom the letter may be shewn, to take bills drawn by Dickson, Tatham, & Co. on the Agra and Masterman's Bank, with reference to the letter, and to alter their position by paying for such bills, with an assurance that, if they or any of them will do so, the Agra and Masterman's Bank will accept such bills on presentation.

If it be necessary to determine the question of the legal liability of the Agra and Masterman's Bank, I am of opinion that, upon the offer in this letter being accepted and acted on by the Asiatic Banking Corporation, there was constituted a valid and binding legal contract in favour of the Asiatic Banking Corporation. The cases as to the offer of rewards (*supra*, p. 2, p. 10, p. 11), appear to me sufficient authority to shew that there may be privity of contract in such a case. And if the view be adopted which appears to have been taken in the American Courts, that the holder of the letter of credit is the agent of the writer for the purpose of entering into such a contract, the same result would be arrived at by a different road.

But even assuming the contract to have been at law a contract with Dickson, Tatham, & Co., and with no other, it is clear that the contract was in equity assignable; and that Dickson, Tatham, & Co. must be taken to have assigned (if assignment were needed) to the Asiatic Banking Corporation, and to have been by the writers of the letter intended to assign to them, the engagement in the letter providing for the acceptance of the bills. Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract. But this is a rule which must yield when it appears from the contract that it must have been intended to be assignable free from such equities. The essence of this letter is that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter, and to have it in order to obtain the acceptance of the bills (which are negotiable instruments payable according to their tenor), and without reference to any collateral or cross claims. Unless this is done, the letter is useless; Dickson, Tatham, & Co., obtain no benefit from it; the takers of the bills obtain no protection under it. The Asiatic Banking Corporation are, in my opinion, assignees of the contract, free from any equities between Dickson, Tatham, & Co., and the Agra and Masterman's Bank.

Claim allowed.

[EDITOR'S NOTE. As a pendant to this case, the student may refer to the cognate decision in *Maitland v. Chartered Mercantile Bank* (38 L.J.R., Ch. 363); which recognises the liability as good at law as well as in equity.]

TAYLOR v. LAIRD.

EXCHEQUER. 1856.

25 L.J.R. Ex. 329.

[*Work and Labour—Entire Contract—Recovery on Indebitatus Count.*]

ACTION upon a contract to employ the plaintiff and to pay him 50*l.* a month, as master of a ship for a certain voyage; with a common count for work and labour.

Plea, to the first count, *inter alia*, that the plaintiff did not act according to the agreement in the command of the vessel during the voyage, but made default in so doing; to the second count, *nunquam indebitatus*.

The defendant had written to the plaintiff, offering him the command of a steamer destined for an exploring and trading voyage up the River

Niger, paying him at the rate of 50*l.* a month, commencing from the 1st of December 1854, and also 20*l.* per cent. on the proceeds of the trade. The plaintiff replied in writing that he accepted the proposal, "to be paid 50*l.* a month, and 20*l.* per cent. on the net proceeds of the trade," and on the other terms mentioned in the defendant's letter. The plaintiff received 50*l.* a month for several months before the voyage commenced, and afterwards proceeded in command of the vessel. In the course of the voyage up the river, and before the trading part of it commenced, disputes having arisen between the plaintiff and one of the gentlemen sent out with him to conduct the trading business, the plaintiff, in August (the ninth month from his retainer), relinquished to that gentleman "the navigation and social management" of the vessel; and from that time until the end of the voyage it did not appear that he took any actual part in the navigation or general management, although he professed at the time his readiness to lend every assistance, and co-operated in the trading. When the vessel on her return reached Fernando Po, he discharged a native crew who had been engaged for the navigation of the Niger, landed different portions of the cargo, engaged other sailors to complete the crew, ordered repairs to be done to the ship, and came home in her to Limerick. There was no evidence that he had actually conducted the navigation of the vessel to Limerick; but when she reached that port he received a letter from the defendant (who had previously heard of the plaintiff's relinquishment of the actual command), desiring him to discharge the crew, &c. The plaintiff had received seven months' salary, and had entered on the ninth month when he gave up the command. There was evidence of an amount of trade, on which the 20*l.* per cent. commission would come to 172*l.*

The jury found on the first count for the defendant, being of opinion that the plaintiff had wrongfully abandoned the command of the vessel; but on the next count they found for the plaintiff for 672*l.*, i.e. 500*l.* for ten months' salary, at 50*l.* a month, and 172*l.* for commission.

The Court granted a rule nisi to enter a verdict for the defendant or for a new trial, on the grounds that the verdict was unsupported by the facts, or that the amount was excessive.

* * * * *

Sir F. Thesiger shewed cause. Firstly, the plaintiff was entitled to recover upon the special contract; at all events for one month's salary.... Secondly, there was evidence from which the jury were at liberty to infer a new contract to pay the plaintiff *quantum meruit* for his services after his relinquishment of the navigation.

[POLLOCK, C.B. Evidence of a recognition or acceptance of services may be sufficient to shew an implied contract to pay for them, if at the time the defendant had power to accept or refuse the services. But in this case the defendant did not know of the services you rely on until the return of the vessel; and it then was something past, which would not imply—perhaps would not support—a promise to pay for it. Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes;

what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself.]

Watson for the defendant. The contract was an entire and single contract, the mode of payment to be at the rate of 50*l.*, and is within the rule laid down in *Cutter v. Powell* (6 T.R. 320)...The principle upon which the present case is to be distinguished from ordinary cases of hired servants paid by salary, monthly or quarterly, is, that where the service is *homogeneous* in character (so that the value of service for one month or quarter is the same as the value of another, and the value of one is not less because subsequent service may not be performed), there a distinct cause of action may arise at the expiration of any month or quarter of actual service, for a month or a quarter's salary. But it is not so where the service is not homogeneous, but the value of the former part of the service is little or nothing unless the latter part of the service is also rendered. It was so in this case, for the essence of the consideration for the contract was the exploring part of the voyage, and the plaintiff failed to render service at that very part. It is not a case of imperfect performance or partial failure of consideration, but of entire default and of total failure. The service contracted for was not in fact rendered, viz. the service in the exploring part of the voyage. That was the gist of the consideration, and failure in that was failure *in toto*. The monthly payments were merely the measure of remuneration. If the voyage had not been substantially completed, the plaintiff's representatives could not upon his death recover on the contract. This, however, is a case not of death, but of wilful default.

And as, even entire, the contract is terminated by mutual consent, no implied contract necessarily arises to remunerate the party *quantum meruit*—*Lamburn v. Cruden* (2 M. & G. 253). It is a question of fact, whether any such new contract has arisen, and here there was no evidence of it.

And, at all events, the damages were excessive.

[*Per Curiam*.—Clearly they were so. On that ground alone there would be a new trial; and the only question is as to whether the verdict ought not to be for the defendant. As to that we will consider.]

Cur. adv. vult.

POLLOCK, C.B. The plaintiff is entitled to a verdict for 50*l.* on the first count, upon the ground that the contract was for monthly payments of 50*l.*, and that eight months had elapsed and only seven had been paid for....In the plaintiff's answer, he uses the expression, "The pay to be 50*l.* per month." If this does not differ from the defendant's letter, it shews what is meant; if it does, it was a new offer, approved and accepted by the defendant; and thus it serves either to supersede or to explain the original letter of the defendant. Then "50*l.* per month" means each month, and gave a cause of action as each month elapsed. And a right of action thus once vested could not be divested by the plaintiff's deserting or abandoning the voyage. The words are plain. Moreover, if this construction were not given to it, the result would be,

that if the plaintiff had died or relinquished the command at any time before the end of the voyage, nothing would have been payable. This could not have been intended by the parties. It was said that if the plaintiff's construction were to be adopted, he might have relinquished the command before the voyage began, and recovered his pay for the period previous to its commencement. No doubt that consequence would follow. But contracts should be construed as though they were made upon the supposition that the parties would keep them, not break them, and on that supposition the plaintiff's construction is reasonable; the defendant's is not.... As to the other count, we think there was some evidence to go to the jury upon the part of the plaintiff, but that the damages should be only nominal or next to nominal.

Rule absolute to reduce verdict to 50l., otherwise a new trial.

FELTHOUSE v. BINDLEY.

COMMON PLEAS. 1862.

11 C.B. N.S. 869.

[Offer—Failure to accept—Subsequent Admissions.]

THIS was an action for the conversion of a horse. Pleas, not guilty, and not possessed.

The plaintiff was a builder residing in London. The defendant was an auctioneer residing at Tamworth. John Felthouse, a nephew of the plaintiff, being about to sell his farming stock by auction, a conversation took place between the uncle and nephew respecting the purchase by the former of a horse of the latter. John, on January 1st, 1861, wrote to his uncle as follows:—"My father told me that you considered you had bought the horse for 30l. If so, you are labouring under a mistake, for, 30 guineas was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price; as I would not take less.—John Felthouse."

The plaintiff, Paul Felthouse, on the following day replied:—"Your price, I admit, was 30 guineas. I offered 30l.—never offered more: and you said the horse was mine. However, as there may be a mistake about him, I will split the difference—30l. 15s.—I paying all expenses from Tamworth. You can send him at your convenience. If I hear no more about him, I consider the horse mine at 30l. 15s."

To this letter the nephew sent no reply. On February 25th the sale took place, the horse fetching 33l., which sum was handed over to John Felthouse. On the following day, the defendant (the auctioneer), being apprised of the mistake, wrote to the plaintiff as follows:—"I am obliged to acknowledge myself forgetful in the matter of one of Mr John Felthouse's horses. Instructions were given me to reserve the horse: but a multiplicity of business, pressing upon me, caused me to forget my promise. I will do all I can to get the horse again."

On February 27th, John Felthouse wrote to the plaintiff, as follows:

"Bangley, February 27th, 1861.

My dear Uncle,—My sale took place on Monday last, and we were very much annoyed in one instance. When Mr Bindley came over to

take an inventory of the stock, I said 'that horse' (meaning the one I sold to you) 'is sold.' Mr B. said it would be better to put it in the sale, and he would buy it in without any charge. Father stood by whilst he was running it up, but had no idea but he was doing it for the good of the sale, and according to his previous arrangement, until he heard him call out Mr Glover. He then went to Mr B. and said 'That horse was not to be sold.' He exclaimed he had quite forgotten, but would see Mr Glover and try to recover it, and says he will give 5*l.* to the gentleman if he will give it up: but we fear it doubtful....I am very sorry; but hope we shall make matters all right; and would have given 5*l.* rather than that horse should have been given up."

On the part of the defendant it was submitted that the letter of the 27th of February, 1861, was not admissible in evidence. The learned judge, however, overruled the objection. It was then submitted that the property in the horse was not vested in the plaintiff at the time of the sale. A verdict was found for the plaintiff, damages 33*l.*; leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that the objection was well founded.

Dowdeswell obtained a rule nisi, on the grounds that sufficient title or possession of the horse, to maintain the action, was not vested in the plaintiff at the time of the wrong; that the letter of John Felthouse of February 27th was not admissible in evidence against the defendant: that, even if it was admissible, being after the sale of the horse by the defendant, it did not confer title on the plaintiff; and that there was at the time of the wrong no sufficient memorandum in writing, or possession of the horse, or payment, to satisfy the Statute of Frauds. *Carter v. Toussaint* (5 B. & Ald. 855) and *Bloxam v. Sanders* (4 B. & C. 941) were referred to.

Powell shewed cause....There was an ample note of the contract in writing to satisfy the Statute of Frauds....Could the plaintiff after his letter of the 2nd of January have refused to take the horse? It is true that letter was unanswered; but it was proved that the nephew afterwards spoke of the horse as being sold to the plaintiff, and desired the auctioneer (the defendant) to keep it out of the sale. Although written after the conversion, the letter of the 27th of February was clearly evidence, and, coupled with the plaintiff's letter of the 2nd of January, constituted a valid note in writing, even as between the uncle and the nephew. The letter of the nephew on the 27th is an admission by him that he had, before that day, assented to the bargain with the plaintiff. [BYLES, J. That only shews a binding contract on the 27th of February. What right had the plaintiff to impose upon the nephew the trouble of writing a letter to decline to assent to the contract?] It was not necessary that he should assent to the contract by writing: it is enough to shew that he assented to it. [BYLES, J. There was no delivery or acceptance: and there could be no admission of delivery and acceptance. WILLES, J. To be of any avail, you must make out a valid contract between the uncle and nephew prior to the 25th of February.] It was not necessary that the assent to the terms of the plaintiff's letter should be in writing. In *Dobell v. Hutchinson* (3 Ad. & E. 355) it was held, that, where a note

in writing exists which binds one party to a contract, under the Statute of Frauds, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any contract which contains them.... [BYLES, J. I feel great difficulty in seeing how the nephew's subsequent admission can be binding on the defendant, or even evidence against him.] It is enough that the memorandum relied on to satisfy the Statute of Frauds is made at any time before action brought: *Bill v. Bament* (9 M. & W. 36).

WILLES, J....It is clear that there was no complete bargain on the 2nd of January: and it is also clear that the uncle had no right to impose upon the nephew...the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him: the uncle might also have retracted his offer at any time before acceptance. It stood an open offer. When the nephew was about to sell his farming stock by auction, the auctioneer (the defendant) was told that the horse in question was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which the uncle had named—30*l.* 15*s.*: but he had not communicated such intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant.

Then, what is the effect of the subsequent correspondence? The letter of the auctioneer amounts to nothing. The letter of the nephew, of February 27th, may be treated either as an acceptance then for the first time made by him; or as a memorandum (sufficient within the Statute of Frauds) of a bargain complete before the 25th of February. It seems to me that the former is the more likely construction: and, if so, it is clear that the plaintiff cannot recover. But, assuming that there had been a complete parol bargain before February 25th, and that the letter of the 27th was a mere expression of the terms of that prior bargain (and not a bargain then for the first time concluded) it would be directly contrary to *Stockdale v. Dunlop* (6 M. & W. 224) to hold that that acceptance had relation back to the previous offer so as to bind *third* persons, in respect of a dealing with the property by them in the interim....

KEATING, J. I am of the same opinion. Had the question arisen as between the uncle and the nephew, there would probably have been some difficulty.

WILLES, J. *Coats v. Chaplin* (3 Q.B. 483) is an authority to shew that John Felthouse might have had a remedy against the auctioneer. There, the traveller of Morrisons, tradesmen in London, verbally ordered goods for Morrisons of the plaintiffs, manufacturers at Paisley. No order was given as to sending the goods¹. The plaintiffs gave them to the defendants, carriers, directed to Morrisons, to be taken to them, and also sent an invoice by post to Morrisons, who received it. The goods having been

¹ [EDITOR'S NOTE. Hence, the carriers thus not being authorized by the purchasers, delivery to the former was not a delivery to the purchasers, and consequently the ownership did not pass to them.]

lost by the defendants' negligence, and not delivered to Morrisons—it was held that the defendants were liable to the plaintiffs.

Rule absolute.

[EDITOR'S NOTE. This decision was upheld by the Exchequer Chamber; 7 L.T. N.S. 835; 11 W.R. 429.]

ELIASON *ET AL.* v. HENSHAW.

U.S. SUPREME COURT. 1819.

4 WHEATON, 225.

[Prescribed mode of acceptance.]

ERROR to the Circuit Court for the District of Columbia.

WASHINGTON, J....This is an action, brought to recover damages for the non-performance of an agreement, alleged to have been entered into for the purchase of a quantity of flour. A letter from Eliason's firm to Henshaw, dated February 10th, 1813, says: "Captain Conn informs us that you have a quantity of flour to dispose of....If you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water in Georgetown. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to Henshaw at his mill, at Mill Creek (distant about twenty miles from Harper's Ferry), by a wagoner then employed by Henshaw to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th. An answer, dated the succeeding day, was written, addressed to Eliason at Georgetown; and despatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. The writer says: "Your favor of the 10th instant was handed me last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown by the first water, at \$9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river. As to any advance, will be unnecessary;—payment on delivery is all that is required."

On the 25th, Eliason's firm sent Henshaw an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day; and as we did not get it, had bought all we wanted." The wagoner, by whom Eliason's first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry. He did not in fact return in Henshaw's employ. The flour was sent down to Georgetown in March; and the delivery of it to the plaintiffs was regularly tendered, but refused.

Upon this evidence, the defendants in the Court below (the plaintiffs

in error) moved that Court to instruct the jury, that, if they believed the said evidence to be true as stated, the plaintiff in this action was not entitled to recover the price of the 300 barrels of flour. The Court being divided in opinion, the instruction prayed for was not given. The question is, whether the Court below ought to have given the instruction to the jury. If they ought, the judgment, which was in favor of the plaintiff in that Court, must be reversed.

An offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made. Any departure from those terms invalidates the offer; unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the defendants offered to purchase two or three hundred barrels of flour, to be delivered at Georgetown by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer they required an answer by the return of the wagon by which the letter was despatched. This wagon was at that time in the service of Henshaw, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the defendants then were. The meaning of the writers was obvious. They could easily calculate (by the usual length of time employed by this wagon in travelling from Harper's Ferry to Mill Creek, and back again with a load of flour) about what time they should receive the desired answer. Therefore it was entirely unimportant whether it was sent by that or another wagon, or in any other manner; provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from that mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent constituted an essential part of the plaintiff's offer.

But no answer to this letter was at any time sent to the defendants at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed to Georgetown, and received at that place. But an acceptance communicated at a place different from that pointed out by the defendants and forming a part of their proposal, imposed no obligation binding upon them (unless they had acquiesced in it, which they declined doing).

It is no argument, that an answer was received at Georgetown; the offerors had a right to dictate the terms upon which they would purchase the flour; and, unless these were complied with, they were not bound. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the Court ought, therefore, to have given the instruction to the jury which was asked for.

Judgment reversed.

[EDITOR'S NOTE. An offer, made by a single individual to another, lapses by the death of either before acceptance. Yet in *Reynolds v. Atherton* (W.N. [1921] 109, 174) Eve, J., held that an offer made to a group of persons is not necessarily cancelled by the death of some of them, but may be validly accepted by the survivors along with the executors of the deceased. But Warrington, L.J., appears to have dissented from this, at any rate as regards the executors.]

HENDERSON *ET AL.* APP.; STEVENSON RESP.

HOUSE OF LORDS. 1875.

L.R. 2 SC. APP. CA., 470.

[*Steam-Packet Company's Responsibility for Loss of Luggage—
Passenger's Assent.*]

LIEUTENANT STEVENSON, of the 18th Royal Irish Regiment, purchased from the owners of the Countess of Eglinton steamer, a ticket for his passage from Dublin to Whitehaven; and went immediately on board. The ship was wrecked off the Isle of Man on the following day, entirely through the fault of those in charge. Lieutenant Stevenson got ashore, suffering great personal inconvenience, and losing his luggage, which was never recovered. He brought the present action in a Scottish court against the above Appellants for 71*l.* and costs. The defence was a remarkable one; the Appellants insisting that they were free from all liability for injury either to the Pursuer or to his luggage; their allegation being that they had entered into no contract with him; and that, at all events, they were saved from responsibility by an indorsement on the ticket which he had received, there being on the back of it a printed intimation in the following words:—"The company incurs no liability in respect of loss, injury, or delay to the passenger or to his luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise." The Pursuer answered that the ticket on the face of it had only these words "Dublin to Whitehaven"; and that he had never looked at the ticket nor seen the notice on the back of it, no one having directed his attention to either; so that there was no assent on his part to the alleged stipulation.

The Lord Ordinary gave judgment in favour of the Pursuer; and the Court of Session adhered to this decision; (Session Cases, 4th series. i. 215). Against it, the defendants appealed to the House. Their counsel maintained that the stranding of the ship was an accident of the seas, for which the Appellants were not liable; and insisted that upon a true construction of the contract between the Appellants and the Respondent they were not liable for his losses. They cited: *Zunz v. South-Eastern Ry. Co.* (L.R. 4 Q.B. 545); *Carr v. Lancashire and Yorkshire Ry. Co.* (7 Ex. 707); and *Stewart v. North-Western Ry. Co.* (3 H. & C. 135).

LORD CAIRNS, L.C. ... With regard to the knowledge of the Respondent of what was printed upon the back of the ticket, his own evidence (which is not controverted, and upon which he does not appear to have been challenged or cross-examined), is that in point of fact he did not read, and did not know, what was printed upon the back of the ticket. There was nothing upon the face of the ticket referring him to the

back, and there was nothing said by the clerk who issued the ticket to direct the Respondent's attention to what was printed upon the back. Therefore as a matter of fact the Respondent was not aware of that which was printed upon the back of the ticket; consequently, so far as any intelligent knowledge of what was there printed is concerned, he cannot be taken intelligently to have agreed to the terms printed upon the back of the ticket.

I asked with some anxiety what was the authority for the proposition that a member of the public was to be supposed to have contracted under those circumstances in that way; and I have listened with great attention to all the authorities that have been cited. A great number of those authorities are cases where there was no question at all arising as to what the nature of the contract was. They were cases in which it was assumed either by the admission of both sides, or by the pleadings, that terms similar to those which I have read in the present case as printed on the back of the ticket formed part of the contract in those different cases. Those cases therefore have no relation whatever to the present. There were a considerable number of other cases in which for the conveyance of animals or of goods, a ticket or paper had been issued actually signed by the owner of the animals or by the owner of the goods. With regard, again, to those cases there might indeed be a question what was the construction of the contract, or how far the contract was valid. But there could be no question whatever that the contract, such as it was, was assented to and was entered into by the person who received the ticket.

But what are the cases which are analogous in any way to the present? My Lords, of all that were cited there was really only one which could be said to approach the present case. That was *Stewart v. N.W. Ry. Co.*, with regard to a ticket issued upon the occasion of an excursion train. There a ticket had been issued to the excursionist which had upon the face of it "ticket as per bill." Therefore on that part of the ticket which the excursionist must have seen he was referred to some bill. It was in evidence further, by the admission of the excursionist himself, that he had seen and had read in the office a large bill with regard to the excursion; (3 H. & C. 135).

That decision does not in any way govern the present case, in which there was no reference whatever upon the face of the ticket to anything other than that which was written upon the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract complete and self-contained without reference to anything *dehors*. Those who were satisfied to hand to the passenger such a contract complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only, with the passenger; and the passenger, on his part, receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shewn to him.

LORD CHELMSFORD....The steam-packet company was established for the carriage and conveyance of passengers, passengers' luggage, live stock and goods. Their liability by law to a passenger is to carry and

convey him with reasonable care and diligence. Of course any person may enter into an express contract with them to dispense with this obligation and to take the whole risk of the voyage on himself. And this contract may be established by a notice excluding liability for the negligence (or even for the wilful misconduct) of the company's servants, if assented to by the passenger. But by a mere notice, without such assent, they can have no right to discharge themselves from performing what is the very essence of their duty (which is to carry safely and securely, unless prevented by unavoidable accidents). Such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger and of his having expressly assented to it. The mere delivery of a ticket with the conditions indorsed upon it is very far, in my opinion, from conclusively binding the passenger.

The Lord Chief Justice in *Zunz v. S.E. Ry. Co.* (L.R., 4 Q.B. 539), which was referred to, felt himself bound by the authorities to hold that when a man takes a ticket with conditions printed on it, he must be presumed to know the contents of it, and must be bound by them. I was extremely anxious to be referred to the authorities; but although numerous authorities were cited by Mr Milward, none of them go the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money; the ticket being only a voucher that the money has been paid. Or, if a ticket is necessary to bind the company, the moment it is delivered the contract is completed, before the passenger has had an opportunity of reading the ticket, much less the indorsement. It may be a question whether, if a passenger were to read the indorsement and decline to agree to the terms, the company could refuse to take him as a passenger. Holding themselves out as undertaking to convey passengers by their vessels, it might be held that they are bound to carry upon the terms of their common law liability alone, unless a special contract be entered into with the passenger. But it is unnecessary to consider this point.

I have expressed a view of the case which places the right of the Respondent to an interlocutor in his favour on a different ground from that which was assumed by the Court of Session; but I agree in the reasons which led them to their conclusion¹; because I think that a limitation of the legal liability of the steam-packet company as carriers ought to be most strictly construed, as well as the assent to it distinctly proved....

Appeal dismissed.

¹ [EDITOR'S NOTE. Their conclusion was, that liability for such a loss as was sustained by the Respondent was not excluded by the words of the notice; which must be construed as applying only to risks during the voyage, and not to a non-performance of the voyage itself—a breach of the very essence of the contract.]

[EDITOR'S NOTE. This decision was followed in *Richardson v. Rowntree*; L.R. [1894] A.C. 217. There the condition relating to a steerage-passenger's contract for her voyage from America to Liverpool was printed on her ticket, but in small type and with a red stamp across it, and the ticket was handed to her folded up, so that no writing was visible unless she opened it. The House of Lords held that the case was not one which ought to have been withdrawn from the jury; and that they were rightly asked whether the defendants had done what was reasonably sufficient to give the plaintiff notice of the condition. Lord Watson agreed with the jury that the defendants had *not*.]

BURKE v. THE SOUTH EASTERN RAILWAY COMPANY.

COMMON PLEAS DIVISION. 1879.

L.R. 5 C.P.D. 1.

[*Railway Company's Continental Ticket—Notice of Conditions.*]

MOTION for judgment.

Action to recover damages for personal injury caused to the plaintiff through the negligence of the defendants.

The trial took place before Cockburn, C.J., and a jury, when it appeared that the plaintiff had taken from the defendants an ordinary cheap return ticket, consisting of a small paper book with eight leaves. On the cover, or outer leaf, which formed the first page, was printed the number of the ticket, and the words, "South Eastern Railway Cheap return ticket. London to Paris and back. Second class. Available by night-service only. This ticket is available for 14 days, including the day of issue and expiry. Example. A ticket issued on the 1st of the month will be available for the return journey up to and including the 14th. Available for the return journey by the South Eastern or London, Chatham, and Dover Railways." Inside the cover, that is to say, on the second page, statements were printed that "The cover without the coupons or the coupons without the cover, are of no value," and that "Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies...." The inside leaves were coupons, each of which was to be given up at a different stage of the journey. The plaintiff while travelling under this ticket on a railway in France was injured through the negligence of the railway servants. He gave evidence that, although he had often made the same journey with similar tickets, he had never read and did not know of the condition. The defendants did not dispute the truth of his statement, but relied on the condition.

The learned judge directed the jury that if the condition was brought to his notice it would be a defence; and asked the jury whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff. The jury found that it was not, and gave their verdict for him with 250*l.* damages.

McIntyre, Q.C., for the plaintiff. On the finding of the jury the plaintiff is entitled to judgment; *Henderson v. Stevenson* (*supra*, p. 32).... The condition must be brought to the traveller's notice....There was

nothing to call the attention of the plaintiff to the condition on the inside of the cover....

LORD COLERIDGE, C.J....I will assume that the plaintiff was admitted not to have read and not to know of this condition. The question is, Does that, under the circumstances, afford any defence? In my opinion it affords none. The contract, as I understand it, can only be this little book, and the whole of this little book....In *Henderson v. Stevenson* the House of Lords assumed that the whole contract was contained on the one side of the one piece of paper. Now, if the House of Lords would have come to the conclusion that the contract in such a case as this was really limited by the first side of the first leaf of these pages their decision in *Henderson v. Stevenson* would be binding on us. But I see the widest distinction between the facts of the one case and the other. Here is a small book with many pages, and it is admitted that the whole of the leaves are, during the continuance of the contract, to be made use of, and the passenger cannot turn over the first sheet and make use of the first coupon without having under his eyes the condition on which the defendants rely. It cannot be contended that the first sheet forms the whole contract; because it was admitted that the coupons form part of the contract....The mere fact of his not choosing to read, or even of his not having read the term, which was not concealed from him, is no ground whatever for rejecting that, any more than any other part of the contract.

LINDLEY, J. What was the contract, if any, into which the parties entered? The only contract entered into was formed thus: the plaintiff paid a sum of money for a journey to Paris and back, and he received this ticket. The jury have not found what the contract was, the question was not put to them in that shape; but they may be assumed to have found that the plaintiff did not know of the restrictive condition, and they have found that sufficient notice of it was not given to him. That leaves open the question what was the contract? Can the plaintiff make out a contract without that condition? I think it impossible for him to do so. If the jury had found that the contract was what was printed on the first page, or on the coupons without the cover, the verdict would be so manifestly against the evidence that it could not stand. But they have not so found. I think that the answer to the question, What was the contract? is, "Here, in this small book, is the contract." The facts of *Henderson v. Stevenson* were different. On the face of the card in that case was, "Dublin to Whitehaven," and nothing else; and on the back a condition. The House of Lords, as it were, split it in two; and said there was room to find that the contract was what appeared on the face of the card. But it would be impossible to split this contract up. It does not admit of it. Its physical form is altogether different. The plaintiff cannot sue on a contract and ignore one of the terms.

Judgment for the defendants.

WATKINS v. RYMILL.

QUEEN'S BENCH DIVISION. 1883.

L.R. 10 Q.B.D. 178.

[Repository for Sale—Notice of Conditions—Assent.]

RULE calling on the plaintiff to shew cause why the verdict found for him in the Mayor's Court, London, should not be set aside and a verdict entered for the defendant, or why a new trial should not be had on the ground of misdirection.

STEPHEN, J. The facts of the case were as follows: The plaintiff was the owner of a waggonette and the defendant was the keeper of a repository for the sale on commission of horses, carriages, and harness. On May 11th, 1878, the plaintiff took the waggonette to the repository and left it to be sold, receiving for it a receipt on a printed form which was in these words: "Herbert Rymill's Royal Repository, Barbican, for the sale of horses, carriages, harness, &c. Sales by auction every Tuesday and Friday at 11. Received from —, *subject to the conditions as exhibited on the premises* [these words were italicized]. The proceeds paid on Monday between the hours of eleven and four upon the production of the receipt signed by the owner, or forwarded by post if desired."

The conditions exhibited on the premises were printed conditions, exhibited in conspicuous positions in many parts of the premises. The following were the conditions bearing upon the present case:

"10. Should any horse or other property sent to this repository remain over one month the proprietor shall be at liberty to sell the same by public auction only, with or without notice to the owner, unless all expenses are previously paid. All horses, carriages, carts, &c., sent to this repository for sale remain at the risk of the owner."

Amongst the terms were the following: "Two shillings and sixpence per week standing for four-wheel carriages and Hansom cabs....Two shillings and sixpence for washing each carriage....No horses or other property allowed to be taken away until the keep, sale, and other expenses are paid."

The plaintiff swore that he did not read the receipt, but put it in his pocket without noticing it. About a month after leaving the waggonette the plaintiff called and asked after it. He was told (but not, so far as it appeared, by any person authorized to tell him) that the waggonette was sold, and that the settling day was Monday. He returned on Monday and saw the manager, who told him he must bring the receipt. He said he had lost it. They refused to go into the matter without the receipt. The receipt was not found until October; and during this time the plaintiff took no steps except calling two or three times to make inquiries. In November, the plaintiff through his solicitor applied for the waggonette; and found that it had shortly before been sold for 9*l.* 19*s.* 6*d.*, of which the whole except 6*s.* 10*d.* was due for charges under the terms stated in the conditions quoted. The defendant sent the plaintiff a post office order for 16*s.* 10*d.* (mistaking the amount of his charges); and thus considered himself to have overpaid him.

The defendant's counsel argued that the Common Serjeant, who sat as judge, ought to direct the jury on these facts to find for the defendant. But the Common Serjeant held that the question was one "for the jury, whether the defendant had or had not given the plaintiff reasonable notice of the conditions." This question the jury answered in the negative, and gave a verdict for the plaintiff for 21l....

In *Henderson v. Stevenson* the steamboat company attempted to rid themselves of a common law liability by annexing to their contract a condition (most unusual in itself) to which the course adopted by them would not naturally call the attention of the other party. In the present case the notice was printed on the face of the receipt, and formed a prominent part of it. The circumstances of the contract were such that any man of ordinary intelligence must have known that special terms as to its execution must in the nature of things be made. And by handing to the plaintiff the receipt in question the defendants called his attention to the subject as pointedly as if their clerk had said "Read this. It expresses the terms on which we are ready to take your waggonette...."

The result of the authorities appears to be as follows. A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not. To this general rule however there are a variety of exceptions.

(1) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms.

(2) A second exception would be the case of fraud; as, if the conditions were printed in such a manner as to mislead the person accepting the document.

(3) A third exception occurs, if, without being fraudulent, the document is misleading and does actually mislead the person who has taken it. The case of *Henderson v. Stevenson* is an illustration of this; (*supra*, p. 32).

(4) An exception has been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. One is the case of a ticket having on it a condition that the goods deposited in a cloak-room should become the absolute property of the railway if not removed in two days. We are aware of no absolute decision on this point, nor is it material to the present case.

To apply these principles to the case before us. It is obviously within the general rule. Can it be brought under any of the exceptions? The only one which can apply to it is the one which we have put first. Can it be said that the nature of the transaction was such that the plaintiff

might suppose, not unreasonably, that the document contained no terms at all, but was a mere acknowledgment of an agreement not intended to be varied by special terms? It seems to us impossible to suppose that this can have been the case. The acceptance of a carriage for sale on commission is not a simple contract, the terms of which are established by the common law in the absence of any special agreement by the parties. They must, from the nature of the case, be as special as those of a contract of lease or a bill of lading. This consideration, alone, seems to us to establish the conclusion that the receipt and conditions to which it refers constituted the contract between the parties, and that the learned Common Serjeant misdirected the jury when he told them that the question was whether the defendant had given reasonable notice to the plaintiff of the conditions. We may observe that in no view of the case could this direction be upheld. If any question at all were asked it ought to have been [as suggested by Mellish, L.J., in *Parker v. S.E. Ry. Co.* (2 C.P.D. 416)] whether the defendant took reasonable means to give notice of the conditions to the plaintiff, which is a very different one.

Ought we to enter a verdict for the defendant or to send the case back for a new trial in order that the question suggested by Mellish, L.J., may be put? We think that we ought to enter judgment for the defendant. The question of Mellish, L.J., may be proper in cases falling under what we have called the first exception to what we apprehend to be the general rule; but this, in our judgment, is not one of those cases. It resembles *Burke v. S.E. Ry. Co.* (5 C.P.D. 1) in which the ticket was held to be the contract. Suppose that the case were sent for a new trial; and that the jury, on the undisputed facts, were to find that the defendant had *not* taken reasonable means to give notice of the conditions to the plaintiff, would it not be our duty to set that verdict aside as being a verdict which, upon the evidence, no intelligent men could justly return? We think it would....The only question which can be called a question of fact is, whether giving a man a printed paper, plainly expressing the conditions on which a keeper of a repository is willing to accept a carriage for sale on commission, is or is not equivalent to asking the owner of the carriage to read that paper, with intent that he should read it when he has a fair opportunity of doing so. This, we think, is a question of law, to be answered in the affirmative.

Judgment for the defendant.

HITCHMAN v. AVERY.

QUEEN'S BENCH DIVISION. 1892.

8 TIMES LAW REP. 698.

[Consent of parties—Illiteracy—Signature.]

THE plaintiff, a dairyman, sued the defendant under an agreement, by which the defendant had undertaken not to carry on a milk business within two miles of the plaintiff's business. The defendant admitted that, after he had left the plaintiff's employ, he had carried on an opposition milk business within two miles of the plaintiff's business. The agreement in question, which undoubtedly bore his signature, had, he said, been

given him to sign by the plaintiff's manager, who had said, "All the chaps sign them, and it is nothing affecting your position," or words to that effect, and the defendant had accordingly signed his name to it. He swore that he could not read, though while in the Army he had learnt to sign his name. He swore that it had never been read over or explained to him; and there was no evidence on the other side that this had been done. The defendant's wife corroborated his assertion that he could not read, although he could sign his name.

WRIGHT, J., said it was a curious case. The point was whether or not this agreement, which the defendant had undoubtedly signed, was binding upon him. On the evidence he found as a fact that the defendant could neither read nor write, though he could sign his name; and also that the agreement was not read over or explained to the defendant, though, when asked to read it by the plaintiff's manager the defendant had told him that he could not read. That being so, it was clear that the defendant's mind had not assented to any such contract as was contained in the agreement. Had it not been for the fact of the defendant's telling Mr Monday that he could not read, it might be that Monday, seeing the defendant sign his name, would have been justified in assuming that he also could read; and in such a case the defendant might have been estopped, by the fact of his signature to the agreement, from resisting its effect. But that was not the case here; and, believing the defendant's story, he was of opinion that the agreement was not binding.

Judgment for defendant.

[EDITOR'S NOTE. Cf. *Foster v. Mackinnon*, *infra*.]

WEEK v. TIBOLD.

KING'S BENCH. 1605.

ROLLE'S AB. 6.

IF there be a communication between A's father and B respecting a marriage to be had between A and the daughter of B, and B then affirms and declares to A's father that he, B, will give to the man who marries his daughter with his consent £100; and A afterwards marries B's daughter with his consent; yet this affirmation and declaration of B does not raise a promise on which an action of assumpsit can be maintained, for the words spoken do not include any promise.

Yelverton gives as one of the grounds of the decision, "It is not reason that the defendant should be bound by such general words, spoken to excite suitors" (Yelv. 11).

TAYLOR AND ANOTHER, ASSIGNEES OF WALSH, A BANKRUPT, v. BREWER AND OTHERS.

KING'S BENCH. 1813.

1 MAULE AND SELWYN, 290.

[*Services—Remuneration.*]

ASSUMPSIT to recover a compensation for work done by the bankrupt. The defendants composed a committee for the management of the sale of

lottery tickets, and the bankrupt was employed upon their business. The plaintiffs founded their claim on the following resolution of the committee: "That any service to be rendered by Walsh shall, after the third lottery, be *taken into consideration; and such remuneration be made as shall be deemed right.*" Lord Ellenborough, C.J., was of opinion at the trial, that under this resolution it was optional in the committee to remunerate the bankrupt or not, according as they should think right, and therefore nonsuited the plaintiffs.

Park moved to set aside the nonsuit, on the ground that the bankrupt was entitled to some recompense. An agreement with a person that he should do work, and should have what is right for it, did not import that he should have nothing for his trouble if his employer should be so minded, but that he should have a reasonable reward. It should have been left therefore to the jury to consider what was reasonable, as was done in *Peacock v. Peacock* (2 Camp. 42).

LORD ELLENBOROUGH, C.J. In that case the defendant expressly told the plaintiff that he should have a share in the business, leaving only unsettled what particular share he was to have. But here was an engagement accepted by the bankrupt on no definite terms, but only in confidence that if his labour deserved anything he should be recompensed for it by the defendants. This was throwing himself upon the mercy of those with whom he contracted; and the same thing does not unfrequently happen in contracts with several of the departments of government....

LE BLANC, J. It seems to me to be merely an engagement of honour.

BAYLEY, J. The fair meaning of the resolution is this, that it was to be in the breast of the committee whether he was to have anything, and if anything, then how much.

[EDITOR'S NOTE. In *Lake v. Bartlett* (37 T.L.R. 316), Shearman, J., held that a promise "to give me what you like," as consideration, is too vague to support a contract. But he considered that a promise "to give something substantial," or "to make it worth your while," would support it. Cf. *Parker v. Ibbetson*, *infra*.]

WINN v. BULL.

CHANCERY DIVISION. 1877.

L.R. 7 CH. D. 29.

[*Agreement for lease—Stipulation for formal contract.*]

THE plaintiff and defendant signed the following agreement for a lease of a freehold house belonging to plaintiff:

"An agreement entered into between William Winn (the Plaintiff) of the one part, and Edward Bull (the Defendant) of the other part: whereby the said William Winn agrees to let and the said Edward Bull agrees to take on lease for the term of seven years from the 9th day of May, 1877, the dwelling-house and premises known as '*Westwood*,'...at the yearly rent of £180 (the first year's rent to be allowed to the said Edward Bull and to be laid out by him in substantial repairs to the property). This agreement is made subject to the preparation and approval of a formal contract."

No formal or other contract was ever entered into between the parties.

The plaintiff's solicitor subsequently sent the defendant's solicitor a draft of the proposed lease, containing covenants on the part of the defendant to keep the premises in repair. The defendant objecting to take a lease in this form, a correspondence passed between the parties, which resulted in the plaintiff insisting that the lease should remain substantially in its original form, whereas the defendant contended that its terms were contrary to the intention of the agreement, and he ultimately refused to take a lease at all. The plaintiff thereupon brought this action claiming specific performance of the agreement....

Chitty, Q.C., for the plaintiff, contended that the agreement was sufficiently clear in its terms; that it was equivalent to an agreement for a lease containing "usual covenants," which would include a covenant to repair; and that the final clause meant nothing more than that the parties should be bound in a more formal manner.

JESSEL, M.R. I am of opinion there is no contract. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, "We will have the terms put into form," then (all the terms being put into writing and agreed to) there is a contract¹. If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled....

When a man agrees to buy an estate, there are a great many more stipulations wanted than a mere agreement to buy the estate and the amount of purchase-money that is to be paid.... Contracts for purchase of lands should contain something more than can be found in the short and meagre form of an ordinary letter. When we come to a contract for a lease the case is still stronger. When you bargain for a lease simply, it is for an ordinary lease and nothing more; that is, a lease containing the usual covenants and nothing more. But when the bargain is for a lease which is to be formally prepared, no solicitor would, unless actually bound by the contract, prepare a lease not containing covenants which are not comprised in the term "usual covenants." It is then only rational to suppose that when a man says there shall be a formal contract, approved, for a lease, he means that more shall be put into the lease than the law generally allows. Now, in the present case, the plaintiff says in effect, "I agree to grant you a lease on certain terms; but subject to something else being approved." Something else is required, which is not expressed. That being so, the agreement is uncertain in its terms; and consequently cannot be sustained....

In *Chinnock v. Marchioness of Ely* Lord Westbury says (4 D.J. & S. 646):—"I entirely accept the doctrine...that if there had been a final agreement, and the terms of it evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.... But if to a

¹ [EDITOR'S NOTE. Cf. *Fowle v. Freeman*, *infra*; and L.R. [1921] 1 Ch. 57.]

proposal an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." That was approved by the Court of Appeal in *Rossiter v. Miller* (L.R. 5 Ch. D. 648).

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared¹. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or that they should be subject to a new agreement the terms of which are not expressed in detail.

Judgment for defendant.

HYDE v. WRENCH.

CHANCERY. 1840.

3 BEAVAN, 334.

[Offer—Rejection—Mutuality.]

THE defendant being desirous of disposing of an estate, offered, by his agent, to sell it to the plaintiff for 1200*l.*, which the plaintiff, by his agent, declined; and on June 6th the defendant wrote to his agent as follows: "I have to notice the refusal of your friend to give me 1200*l.* for my farm. I will only make one more offer, which I shall not alter from; that is, 1000*l.* lodged in the bank until *Michaelmas*, when title shall be made clear of expenses, land tax, &c. I expect a reply by return, as I have another application." This letter was forwarded to the plaintiff's agent, who immediately called on the defendant; and offered to give the defendant 950*l.* for the purchase of the farm, but the defendant wished to have a few days to consider....The defendant, on June 27th, wrote to the plaintiff's agent, stating he was sorry he could not feel disposed to accept his offer for his farm at present....On June 29th, the plaintiff's agent wrote an answer to the defendant as follows:—"I acknowledge the receipt of your letter of the 27th, informing me that you are not disposed to accept the sum of 950*l.* for your farm. This being the case, I at once agree to the terms on which you offered the farm (*viz.* 1000*l.*) by your letter of the 6th instant." The defendant returned a verbal answer to the last-mentioned letter, that he would see his solicitor thereon.

To a bill, filed by the alleged purchaser for a specific performance, the defendant filed a general demurrer....

Pemberton. So long as the offer of the defendant subsisted, it was competent to the plaintiff to accept it; the offer had not been withdrawn previous to its acceptance by the plaintiff; there, therefore, exists a valid contract. *Kennedy v. Lee* (3 Mer. 454) was cited.

The MASTER of the ROLLS. Under the circumstances stated in this bill, I think there exists no valid binding contract for the purchase of the property. The defendant offered to sell it for 1000*l.*; and if that had

¹ [*"and executed"*; see L.R. [1921] 1 Ch. 298.]

been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract. Instead of that, the plaintiff made an offer of his own, to purchase the property for 950*l.*, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties. •

Demurrer allowed.

COOKE v. OXLEY.

KING'S BENCH. 1790.

3 TERM REP. 653.

[Offer—Revocation—Communication.]

THE declaration stated that the defendant proposed to the plaintiff that the former should sell and deliver to the latter 266 hogsheads of tobacco [at a certain price]; whereupon the plaintiff desired the defendant to give him time. Thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, *if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day.* The plaintiff averred in his declaration that he did agree to purchase the same upon the terms aforesaid¹, and gave notice thereof to the defendant before the said hour of four. He requested the defendant to deliver to him the said hogsheads, and offered to pay the price. The defendant refused delivery. Verdict for plaintiff. A rule was obtained to shew cause why the judgment should not be arrested; on the ground that there was no consideration for the defendant's promise.

Erskine shewed cause. This was a bargain and sale on condition; and though the defendant might have rescinded the contract before four o'clock, yet not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not *delivering* the tobacco, and not for not selling it.

LORD KENYON, Ch.J. Nothing can be clearer than that at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum*.

BULLER, J....It has been argued that this must be taken to be a complete sale from the time when the condition was complied with. But it was not complied with; for it is not stated that the defendant did agree

¹ [EDITOR'S NOTE. But the declaration does not go on to add that the defendant agreed to sell. In *Stevenson v. McLean* (5 Q.B.D. 346) Lush, J., said: "The case of *Cooke v. Oxley* does not appear to me to warrant the inference which has been drawn from it....All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities which have been supposed to conflict with *Cooke v. Oxley*." Cf. *Dickinson v. Dodds*, *infra*. But the student should read Sir F. Pollock's drastic remarks on *Cooke v. Oxley* in his *Treatise on Contracts* (8th ed.), p. 28 n.]

at four o'clock to the terms of the sale, or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise.

*Rule absolute*¹.

OFFORD v. DAVIES AND ANOTHER.

COMMON PLEAS. 1862.

12 C.B. N.S. 748.

[Revocation of offer before acceptance.]

[THIS was an action upon a guarantie. The declaration alleged a contract by the defendants; in consideration that the plaintiff would at the request of the defendants discount bills for a certain other firm, at Newtown, of Davies & Co., not exceeding 600*l.*, the defendants promised to guarantee for twelve months the repayment of such discounts. It alleged the discount of certain bills which were ultimately dishonoured, and no repayment. The plea was, a revocation of the promise before the discount in question. The plaintiff's demurrer raised the question whether the defendants had a right to revoke the promise.]

Prentice, in support of the demurrer. A guarantie like this, to secure advances for twelve months, is a contract which cannot be rescinded within that time without the assent of the person to whom it is given. [BYLES, J. What consideration have these defendants received?] For anything disclosed by the plea, the plaintiff might have altered his position in consequence of the guarantie, by having entered into a contract with Davies & Co., of Newtown, to discount their bills for twelve months. In *Calvert v. Gordon* (7 B. & C. 809) it was held that the obligor of a bond conditioned for the faithful service of A whilst in the employ of B, cannot discharge himself by giving notice that after a certain period he will be no longer answerable; nor can the personal representative of the obligor discharge himself by such a notice. Lord Tenterden, in giving judgment in that case, says: "It is said that it would be a hardship on the surety if this liability must necessarily continue during the whole time that the principal remains in the service; but, looking at the instrument itself, it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all future liability after a specified time after notice given; this he has not done." Here, the defendants have stipulated that their liability shall discontinue at the end of twelve calendar months. What pretence is there for relieving them from that bargain? [BYLES, J. Suppose a man gives an open guarantie, with a stipulation that he will not withdraw it,—what is there to bind him to that?] If acted upon by the other party, it is submitted that that *would* be a binding contract....

E. James, Q.C., *contrà*. The cases upon bonds for guaranteeing the honesty of servants are inapplicable: for, there, the contract attaches as

¹ The Exchequer Chamber affirmed this judgment.

soon as the servant enters the service, and it is not separable. This, however, is not a case of contract at all. It is a mere authority to discount, and a promise to indemnify the plaintiff in respect of each bill discounted; and it was perfectly competent to the defendants at any time to withdraw that authority as to future transactions of discount.... A mutual agreement to rescind can only be necessary where there is a mutual contract. But, in a case like this, where there is no complete contract until something is done by the mandatory, the assent of both parties cannot be required. Suppose Davies & Co. of Newtown had become notoriously insolvent, would the defendants continue bound by their guarantie, if the plaintiffs, with notice of that fact, chose to go on discounting for them? [WILLIAMS, J. Suppose I guarantee the price of a carriage to be built for a third party, who, before the carriage is finished, and consequently before I am bound to pay for it, becomes insolvent,—may I recall my guarantee?] Not after the coach-builder has commenced the carriage. [ERLE, C.J. Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach-builder has prepared the materials, he would probably be found by the jury to have contracted.],...

ERLE, C.J. This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants, or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guarantie for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not.

The promise to repay “for twelve months” creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for defendants.

RAMSGATE HOTEL COMPANY v. MONTEFIORE.
SAME v. GOLDSMID.

EXCHEQUER. 1866.

L.R. 1 Ex. 109.

[*Company—Allotment of Shares—Reasonable Time.*]

THESE were actions for non-acceptance of shares, and for calls, and cross-actions for recovery of deposit, and for damages for not duly allotting shares; turned into a special case.

The company was completely registered 6th June, 1864. By the 2nd article of association it was provided that the company should continue

incorporated, notwithstanding that the whole number of shares in the company might not be subscribed for or issued, and might commence and carry on business when, in the judgment of the board, a sufficient number of shares had been subscribed to justify them in so doing. The prospectus of the company contained the following words:—"Deposit on application 1*l.* per share, and 4*l.* on allotment." The defendant Montefiore, on the 8th June, 1864, filled up, signed, and sent to the directors the printed form of application (annexed to the prospectus), which was as follows:—"GENTLEMEN,—Having paid to your bankers the sum of 50*l.*, I hereby request you will allot me fifty shares of 20*l.* each in the Ramsgate Victoria Hotel Company (Limited); and I hereby agree to accept such shares...." He had so paid the sum of 50*l.*

On August 17th the secretary submitted to the directors a list of applicants for shares up to that time, in which appeared the name of the defendant for fifty shares. The list was headed: "List of subscribers, August 17, 1864." On November 2nd the secretary again submitted a list of subscribers to the directors, but they did not deem it advisable to proceed to an immediate allotment, and entered a minute to that effect. On November 8th, the defendant, having received no communication from the company, withdrew his application. On November 23rd the secretary prepared another list of subscribers, including the defendant's name. The directors made the first call; and by their direction the secretary wrote the following letter to the defendant:—"SIR,—I am instructed by the directors to acquaint you that, in compliance with your application, they have allotted to you 50 shares in this company, and have entered your name in the register of shareholders for the same; and I have to request that you will pay the balance of the first call, as noted below, on or before the 15th December."

The defendant having refused to accept the shares or pay the call, the company brought the present action against him.

It was contended by the company that the last-mentioned list and those previously mentioned, or one of them, constituted a sufficient register of shares within the Companies Act, 1862.

The directors had entered into an agreement for the purchase of the site of the hotel, paid the deposit, and commenced operations.

The facts with respect to Goldsmid were the same, except that he had never withdrawn his application, nor given any notice of his intention to do so.

Mellish, Q.C., for the company, contended that, although, in ordinary cases, the assent of both parties, mutually communicated, was necessary to form a contract, yet on the authority of *Ex parte Bloxam* (33 L.J. (Ch.) 575), and *Ex parte Cookney* (3 De G. & J. 70), shares might be completely allotted without any communication to the applicant, or acceptance by him; that the facts above stated shewed an allotment made on the 17th of August; but that, if not, the allotment in November was, considering the nature of the contract, made within a reasonable time, and, if so made, the letter of withdrawal was inoperative.

THE COURT (POLLOCK, C.B., MARTIN, CHANNELL, PIGOTT, BB.) observed that in both the cases cited, the question was as to the liability

of an applicant for shares as a contributory, and they referred to the judgment of Turner, J.L., in *Ex parte Bloxam*, as explaining the *ratio decidendi* in that case. They held that there was no allotment till November 23rd; that the allotment must be made within reasonable time; and that the interval from June to November was not reasonable; and therefore gave

Judgment for both defendants.

IN RE NATIONAL SAVINGS BANK ASSOCIATION.

HEBB'S CASE.

CHANCERY. 1867.

L.R. 4 Eq. 9.

[*Company--Application for shares withdrawn before notice of allotment.*]

THIS was an application by H. K. Hebb, that his name might be removed from the list of contributories of the National Savings Bank Association, a company now being wound up under the Companies Act, 1862.

On August 28th, 1857, Hebb signed and gave to the agent of the company an application for ten shares in a form provided by the company; and at the same time paid to the agent a deposit of 5s. per share, for which the agent gave him a receipt, with a memorandum that a duly authorized receipt would be forwarded from the head office within eight days.

On September 4th, the directors allotted ten shares to Hebb, and entered his name in the allotment book, and on the same day sent to their agent the letter of allotment with a receipt for the deposit; but the agent did not deliver the letter and receipt to Hebb until September 9th. In the mean time, on the 8th, Hebb had written a letter to the directors, withdrawing his application, and requesting the return of the deposit.

On the 26th of August, 1858, Hebb having insisted upon repudiating the allotment and threatened to sue the company for the deposit, the directors repaid him the deposit. The allotment was not formally cancelled, and Hebb's name remained on the register of shareholders. But he had no further communication from the company until June, 1866, when the company was ordered to be wound up....

De Gex, Q.C., for the applicant. A contract is not binding until the party who has made the proposal has received from the other party notice that the latter has accepted it.

Secondly: even if there was a binding contract, it was annulled when the deposit was returned. It was competent to the company to annul it. And the directors could exercise this power on behalf of the company; *ex parte Beresford* (2 Mac. & G. 197). And even if the directors had no such power, the consent of the shareholders would be presumed after the lapse of so many years: *Brotherhood's Case* (31 Beavan, 365).

Baggallay, Q.C., for the official liquidator. First: the contract was complete as soon as the shares were allotted. The directors could not (either as against the applicant, or as against the other shareholders) have recalled the allotment, whether or not it had been notified to the

applicant. It has never been decided that notice of acceptance is necessary to complete a contract. In *Roulledge v. Grant* (4 Bing. 653), there was no acceptance of the offer. In *Dunlop v. Higgins* (*infra*, p. 54) it was held that a contract was complete as soon as a letter was posted accepting the offer.

Secondly: if the contract was binding, the applicant, having become a shareholder, could only be released by the consent of every shareholder: *Stanhope's Case* (L.R., 1 Ch. 161).

LORD ROMILLY, M.R. The mere writing of a line in a book is not, in my opinion, an irrevocable act; and if a person applies for shares in a company, and the directors write down his name in the allotment book, they may at any time before the allotment has been communicated to the allottee alter or cancel the allotment. If it were not so, a mere accident might irrevocably bind the company. These applications for and allotments of shares must be treated upon the same principles as ordinary contracts. If A writes to B a letter offering to buy land of B for a certain sum of money, and B accepts the offer, and sends his servant with a letter containing his acceptance, I apprehend that until A receives the letter, A may withdraw his offer, and B may stop his servant on the road and alter the terms of his acceptance, or withdraw it altogether; he is not bound by communicating the acceptance to his own agent. The posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties. If Mr Hebb had authorized the agent of the company to accept the allotment on his behalf, there would have been a binding contract, but he gave no such authority. As he had withdrawn his original offer before he received the letter of the directors, the position of the parties was changed, and that letter became an offer which required the acceptance of Mr Hebb to constitute a binding contract....

Mr Hebb never became a shareholder. But if he had once become a shareholder, I should have felt a difficulty in holding that he had been released from that position by the subsequent return of the deposit. His name must be removed from the list of contributories.

DICKINSON v. DODDS.

COURT OF APPEAL. 1876.

L.R., 2 Ch. D. 463.

[*Offer to Sell—Sale to another person—Notice.*]

ON Wednesday, the 10th of June, 1874, the defendant signed and delivered to the plaintiff a memorandum as follows:

"I hereby agree to sell to Mr George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

£800.

John Dodds.

P.S.—This offer to be left over until Friday, 9 o'clock, A.M. 12 June, 1874.

J. Dodds."

The plaintiff alleged that Dodds understood and intended that the plaintiff should have until 9 A.M. Friday to determine whether he would or would not purchase; and that he should absolutely have until that

time the refusal of the property at the price of £800; and that the plaintiff in fact determined to accept the offer on the morning of Thursday, June 11th, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 A.M. on the Friday. On Thursday the plaintiff was informed by a Mr Berry that Dodds had been offering or agreeing to sell the property to Allan, the other defendant. Thereupon the plaintiff, at half-past seven in the evening, went to the house of Mrs Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds, and handed him another duplicate of the acceptance; but Dodds declined to receive it, saying, "You are too late. I have sold the property."

On the day before (Thursday) June 11th, Dodds had signed a formal contract for the sale of the property to the defendant Allan for £800, and had received from him a deposit of £40.

The bill in this suit prayed that the defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the plaintiff; and for damages.

Kay, Q.C., for the plaintiff. The memorandum of the 10th of June, 1874, being in writing, satisfies the Statute of Frauds. Though signed by the vendor only, it is effectual as an agreement to sell the property.

Supposing it to have been an offer only, an offer, if accepted before it is withdrawn, becomes, upon acceptance, a binding agreement. Even if signed by the person only who is sought to be charged, a proposal, if accepted by the other party, is within the statute: *Reuss v. Picksley* (L.R., 1 Ex. 342).

The ruling in *Adams v. Lindsell* (*infra*, p. 52) was approved by the House of Lords in *Dunlop v. Higgins* (*infra*, p. 54); and settles that a contract which can be accepted by letter is complete when a letter containing such acceptance has been posted. The leaving by the plaintiff of the notice at Dodds' residence was equivalent to the delivery of a letter by a postman.

Swanston, Q.C., and *Crossley*, for the defendant Dodds. The bill puts the case no higher than that of an offer. Taking the memorandum of the 10th of June, 1874, as an offer only, it is well established that, until acceptance, either party may retract; *Cooke v. Oxley* (*supra*, p. 44). After Dodds had retracted by selling to Allan, the offer was no longer open. Having an option to retract, he exercised that option: *Humphries v. Carvalho* (16 East 45); *Routledge v. Grant* (4 Bing. 653).

The postscript being merely voluntary, without consideration, is *nudum pactum*; and the memorandum may be read as if it contained no postscript.

Jackson, Q.C., for the defendant Allan....It may be conceded that if there had been an acceptance, it would have related back in point of date to the offer. But there was no acceptance; notice of acceptance served on Mrs Burgess was not enough.

Even if it would have been otherwise sufficient, here it was too late. Dodds had retracted his offer; and the property had become vested in some one else: *Hebb's Case* (*supra*, p. 48). The plaintiff would not have delivered the notice if he had not heard of the negotiation between Dodds and Allan. What retraction could be more effectual than a sale of the property to some one else?

BACON, V.C., made a decree for specific performance. From this decision both the defendants appealed.

In the Court of Appeal:

JAMES, L.J. The document, though beginning "I hereby agree to sell," was nothing but an offer; and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. This memorandum—"This offer to be left over until Friday, 9 o'clock A.M., 12 June, 1874,"—shews it was only an offer. There was no consideration given for the undertaking to keep the property unsold until Friday....This promise, being a mere *nudum pactum*, was not binding; and at any moment before a complete acceptance of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying, "Now I withdraw my offer." There is neither principle nor authority for the proposition that there must be an express and actual retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind has been changed. But in this case,...before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement.

MELLISH, L.J. The first question is, whether this document of June 10th was an agreement to sell, or only an offer to sell. I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance so that both parties are bound, even though an instrument is so worded as to express that both parties "agree," it is in point of law only an offer; and, until both parties are bound, neither party is bound. (It is not necessary that both parties should be bound

within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document.) But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an "offer." This being only an offer, Dodds was not bound to hold the offer over until 9 o'clock on Friday morning, either in law or in equity. That being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made.

Then Dickinson is informed by Berry that the property has been sold to Allan. If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot....It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead¹. Parting with the property has very much the same effect as the death of the owner; for it makes the performance of the offer impossible. So when once the person to whom the offer was made knows that the property has been sold to someone else, it is too late for him to accept the offer. There was no binding contract for the sale of this property to Dickinson. Even if there had been, the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity; because there is no binding contract between Dodds and Dickinson.

Bill dismissed with costs.

[EDITOR'S NOTE. This decision was followed in 1911 in *Cartwright v. Hoogstoel* (105 L.T. 628). Eve, J., there held that an offer cannot be accepted after the offeree has come to know that the offeror has adopted some course of conduct so inconsistent with his offer that a withdrawal of the offer must be inferred.]

ADAMS AND OTHERS v. LINDSELL AND ANOTHER.

KING'S BENCH. 1818.

1 B. & ALD. 681.

[Offer delayed in post—Acceptance by post.]

ACTION for non-delivery of wool according to agreement. At the trial before Burrough, J. it appeared that the defendants, who were dealers in wool, at St Ives, had, on Tuesday, September 2nd, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing

¹ [EDITOR'S NOTE. Similarly, if the recipient of the offer dies, his executors cannot make an effectual acceptance of it. Cf. *per* Kay, J., in *Duff's Executors' Case* (L.R. 32 Ch.D. at p. 306). See note, p. 71 *infra*.]

in Bromsgrove, Worcestershire: "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at *Leicester*; and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days; *receiving your answer in course of post.*"

This letter was misdirected by the defendants to "Bromsgrove, Leicestershire," in consequence of which it was not received by the plaintiffs in Worcestershire till 7 P.M. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday, September 8th, the defendants not having, as they expected, received an answer on Sunday, September 7th (which, in case their letter had not been misdirected, would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances, the learned Judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that the defendants were liable. The plaintiffs accordingly recovered a verdict. The defendants obtained a rule nisi for a new trial; on the ground that there was no binding contract between the parties....

Jervis, in support of the rule, relied on *Payne v. Cave* (3 T.R. 148), and more particularly on *Cooke v. Oxley* (*supra*, p. 44). So here the defendants, who have proposed by letter to sell this wool, are not to be held liable; even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received, there could be no binding contract between the parties. And before then, the defendants had retracted their offer, by selling the wool to other persons.

THE COURT said, that if that were so, no contract could ever be completed by post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants; and it therefore must be taken, as against them, that the plaintiffs' answer was received in course of post.

Rule discharged.

[EDITOR'S NOTE. In reading all this group of cases, the student must remember that only the actual offeree can accept an offer. An offer made to A cannot be accepted by him and his new partner; their "acceptance" is really only a counter-offer; (3 Sm. & G. 113).]

DUNLOP APP., HIGGINS RESP.

HOUSE OF LORDS. 1848.

1 H.L.C. 381.

[Offer by post—Acceptance delayed in the post.]

THIS was an appeal against a decree of the Court of Session.

Dunlop & Co. were iron masters in Glasgow, and Higgins & Co., were iron merchants in Liverpool. Messrs Higgins had written to Messrs Dunlop respecting the price of iron, and received the following answer: "We shall be glad to supply you with 2000 tons, pigs, at 65 shillings per ton, net, delivered here." Messrs Higgins wrote the following reply: "You say 65s. net, for 2000 tons pigs. Does this mean for our usual four-months' bill?" On the 28th January, 1845, Messrs Dunlop wrote, "Our quotation meant 65s. net, and not a four-months' bill." This letter was received by Messrs Higgins on the 30th of January, and on the same day, and by post, but not by the first post of that day, they despatched an answer: "We will take the 2000 tons pigs, you offer us." This letter was dated "31st January." It was not delivered in Glasgow until 2 o'clock, P.M., on the 1st of February, and, on the same day, Messrs Dunlop sent the following reply: "We have your letter of yesterday, but are sorry that we cannot now enter the 2000 tons pig-iron, our offer of the 28th not having been accepted in course." Messrs Higgins wrote on February 2nd to say that they had erroneously dated their letter on January 31st, that it was really written and posted on the 30th, in proof of which they referred to the post-mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them; and, iron having risen very rapidly in the market, Messrs Higgins instituted a suit in the Court of Session for damages, for breach of contract. The defence of Messrs Dunlop was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a binding contract; for, their letter having been delivered at Liverpool before eight o'clock in the morning of January 30th, Messrs Higgins ought, according to the usual practice of merchants, to have answered it by the first post, which left Liverpool at three o'clock P.M. on that day. A letter so despatched would be due in Glasgow at two o'clock, P.M., on the 31st of January. Another post left Liverpool for Glasgow every day at one o'clock, A.M., and letters to be despatched by that post must be put into the office during the preceding evening; if any letter had been sent by that post on the morning of the 31st, it must have been delivered in Glasgow in the regular course of post at eight o'clock in the morning of February 1st. As no communication from Messrs Higgins arrived by either of these posts, Messrs Dunlop contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in Glasgow at two o'clock P.M. of February 1st (at which time Messrs Higgins' letter did actually arrive) before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs Higgins.

An issue was tried before the Lord Justice General, when it appeared that the letter of Messrs Higgins, accepting the offer, was written on

the 30th; that it was posted a short time after the closing of the bags for the despatch at three o'clock, P.M., on that day, and consequently did not leave Liverpool till the despatch at one o'clock in the morning of the 31st; that in consequence of the slippery state of the roads, the bag then sent did not arrive at Warrington till after the departure of the train that ought to have conveyed it, and that this occasioned it to be delayed beyond the ordinary hour of delivery. The Lord Justice General told the jury "that he adopted the law as duly expounded in the case of *Adams v. Lindsell*, and which is as follows: 'A., by a letter, offers to sell to B certain specified goods, *receiving an answer by return of post*; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done. On the day following that when it would have arrived, if the original letter had been properly directed, A sold the goods to a third person." And thereon it was held "that there was a contract binding the parties from the moment the offer was accepted, and that B was entitled to recover against A in an action for not completing his contract."

The counsel for Messrs Dunlop tendered exceptions...before the judges of the First Division, who pronounced an interlocutor, disallowing the exceptions; and that interlocutor was the subject of the present appeal.

Bethell and *Anderson*, for the plaintiffs in error....If a letter is posted in due time, but is not received in due time, who is to bear the loss consequent upon its non-delivery? Certainly not the person to whom it is sent. The fact that it is sent by the Post Office makes no difference in the matter. It is the same as if the letter was sent by a special messenger, in which case it is plain that the person sending the messenger would be responsible for any accident or delay. The appellants are not to be made responsible for the casualties of the Post Office.

Where an individual makes an offer by post, stipulating for, or, by the nature of the business, having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it....The question of reasonableness of notice, which may be admitted in cases of bills of exchange, cannot be introduced in a case where one party seeks to enforce on another the acceptance of a contract. A bill of exchange is already a binding contract; no new right is acquired by notice; it is merely a necessary proceeding to enable the party giving it to enforce a right previously created.

[THE LORD CHANCELLOR. If the letter of acceptance is sent in the usual way, is the sender still responsible for its due delivery?]

If not, then both parties are free. One cannot be bound while the other is free. Each party takes an equal risk. But supposing delay is to be permitted, to what extent is it to be allowed?...three days, or a week, or a fortnight, or a month? But, in fact, no delay is allowed....In mercantile usage, founded on law, the legal condition is to return an answer in a particular time. Mercantile usage has fixed that time as the return of post.

...The respondents cannot claim any advantage from their acceptance of the contract, which acceptance they did not notify; nor condemn the other parties for non-performance of a contract, the acceptance of which they did not know. It is the acceptance which completes the contract. The agreement is not suspended till the offerer has actually received notice of the acceptance, but only until he might have received notice, had that notice been forwarded at the earliest moment....

THE LORD CHANCELLOR....The first exception is that the learned Judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to shew the mistake....

The next exception to be considered raises a more important question. It is, that his Lordship did direct the jury that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the Post Office establishment....But if a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract; as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and *on the earliest post* of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs Higgins, therefore, did on the 30th, in proper time, return an answer by the right conveyance—the Post Office.

It is a very frequent occurrence, that a party, having a bill of exchange which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him. If he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned. He has put the letter into the post, and whether that letter be delivered, or not, is a matter quite immaterial, because, for accidents happening at the Post Office he is not responsible....

Interlocutor affirmed.

IN RE IMPERIAL LAND COMPANY OF MARSEILLES. HARRIS' CASE.

CHANCERY. 1872.

L.R., 7 CH. 587.

[*Application for shares—Allotment posted before revocation received.*]

IN February, 1866, the prospectus of a company in London, called the Imperial Land Company of Marseilles, Limited, was published, requiring

applicants for shares to pay £1 per share on application and £4 on allotment, and stating that interest at the rate of 10 per cent. per annum would during the construction of the works be paid to the shareholders.

Mr Harris, of Dublin, filled up a letter of application for shares as follows: "Having paid to your credit the sum of £200, being the deposit of £1 per share on 200 shares in the above company, I request that you will allot me 200 shares of £20 each in the Imperial Land Company of Marseilles, Limited, and I hereby undertake to accept the same, or any smaller number which you may allot to me, and to pay the balance, £19 per share, thereon; and I agree to become a member of the company, and request you to place my name on the register of members, in respect of the shares allotted to me."

This letter was sent by Mr Harris on March 5th to the directors through a bank, and was duly received. The directors appointed a committee to allot the shares, and 100 shares were allotted to Mr Harris¹. A letter from the secretary of the company, containing notice of this allotment, addressed to Mr Harris at his Dublin address, was put into the post-office at Lombard Street, London, either on the 15th or very early in the morning of the 16th of March, 1866, and was received by Mr Harris at Dublin on the 17th. This letter, after stating that the directors had allotted to Mr Harris 100 shares in the company, on which a balance of £300 was payable to the bankers of the company not later than the 21st of March, 1866, proceeded thus: "As the interest warrants attached to the shares bear interest from the 21st of March, 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at 10 per cent. per annum."

On the 16th of March Mr Harris had written, and put into the post at Dublin a letter addressed to the directors in London, declining to accept shares in the company, as he had not yet received any allotment. The secretary of the company answered on March 17th that it was too late to withdraw the application for shares; and Mr Harris's name was placed on the register of members as holding 100 shares. Mr Harris however, continued to deny that he was a shareholder, and much correspondence passed on the subject.

An order was made for the winding up of the company, and Mr Harris, on July 23, 1869, took out a summons to be removed from the list of contributories.

MALINS, V.C., dismissed the summons: and Mr Harris appealed.

Cole, Q.C., for the appellant. The contract to take shares was not binding until the letter allotting them was received. No doubt there have been cases where a contract has been held complete when the letter accepting an offer has been posted; but all were mercantile cases, in which the law is necessarily different. Until the letter has reached its destination, the acceptance may be retracted.

¹ The articles of association of the company provided for the appointment of a board of directors, and contained the following clauses:—Sect. 7: "The shares shall be allotted by and at the discretion of the board." Sect. 87: "The directors may delegate any of their powers to committees consisting of such number of the members of their body as the directors may think fit."

Moreover, the letter of allotment is not a simple acceptance, but introduces a condition as to interest which is a new term: *English and Foreign Credit Company v. Arduin* (L.R., 5 H.L. 64).

A third objection is, that the allotment is void as being made by a committee instead of by the directors; in direct contravention of the seventh clause of the articles.

SIR W. M. JAMES, L.J.: Three grounds have been taken on behalf of the appellant. One is, that upon the construction of the articles of association, the allotment was invalid, because it was made by a committee of the directors. But the articles have in terms provided that the directors might delegate anything to a committee; and that they did delegate this duty to this committee appears in evidence before us.

The ground on which the greater part of the argument has been addressed to us is that there was a letter posted in Dublin recalling the application for shares before the letter containing the notice of the allotment was received in Dublin....But the contract was complete, and could not be revoked, from the time when the letter was posted. It was completed in exactly the way which the appellant desired, that is to say, he gave his address in Dublin, and the company, according to the ordinary usage of mankind in those matters, returned their answer through the post. That is a complete contract. It does not signify which was the first, the delivery in London or the delivery in Dublin, because the contract was completed at the time when the letter of allotment was properly posted by the company.

The other point raised was, that there was a condition annexed to this allotment letter, and on this point the case of *English and Foreign Credit Company v. Arduin* (L.R., 5 H.L. 64) was cited. In that case the principle was, that where there is an acceptance of an offer, if there is to be a term or condition imposed, it must be clearly so stated; otherwise it is to be considered simply as a notification, which may have such effect as it ought to have in a Court of Law. Here the acceptance was unqualified. The statement as to interest does not introduce a new stipulation. It is not that the allottee is to have the shares provided that he undertakes to pay 10 per cent. It is that he ought to pay exactly on the 21st of March, 1866, but that by way of indulgence the directors have told the bankers that if the allottee subsequently pays the same rate of interest which he would be entitled to receive, then they are authorized to receive payment. It is a mere notification, not intended to be a new stipulation, altering or affecting the express acceptance of the application for shares.

SIR G. MELLISH, L.J.: When a person in one part of the country writes to a person in another part of the country a letter containing an offer, and either directly or impliedly tells him to send his answer by post, and an answer accepting that offer is returned by post, when is a complete contract made? It was contended before us that it is not made until the letter is received; so that until it is received the contract may be revoked by the person who has made the offer. I have been forcibly struck with the very mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received. No mercantile man who has

received a letter making him an offer, and has accepted the offer, could safely act on that acceptance after he has put it into the post until he knew that it had been received.... Suppose that a dealer in Liverpool writes to a dealer in New York and offers to buy so many quarters of corn or so many bales of cotton at a certain price, and the dealer in New York, finding that he can make a favourable bargain, writes an answer accepting the offer. Then, according to the argument that has been presented to us to-day, during the whole time that the letter accepting the offer is on the Atlantic, the dealer who is to receive it in Liverpool, if he finds that the market has fallen, may send a message by telegraph and revoke his offer.

Nor is there any difference between an offer to receive shares and an offer to buy or sell goods. And yet, if the argument is sound, then for nearly ten days the buyer might wait and speculate whether the shares were rising or falling, and if he found they were falling he might revoke his offer.

Appeal dismissed.

HOUSEHOLD INSURANCE COMPANY v. GRANT.

COURT OF APPEAL. 1879.

L.R., 4 Ex. Div. 216.

[Allotment of shares—Letter of allotment posted but not received.]

ACTION to recover 94*l.* 15*s.*, being the balance due upon 100 shares allotted to the defendant on October 25th, 1874, in pursuance of an application from the defendant for such shares dated September 30th, 1874.

At the trial before Lopes, J., the following facts were proved. In 1874, one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for shares in the plaintiffs' company. It stated that the defendant had paid to the bankers of the company 5*l.*, being a deposit of 1*s.* per share, and requested an allotment of 100 shares, and agreed to pay the further sum of 19*s.* per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company on October 20th, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence 16, Herbert Street, Swansea, Glamorganshire. His name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the 5*l.* mentioned in his application, but the plaintiffs' company being indebted to the defendant in the sum of 5*l.* for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate; these dividends, amounting altogether to the sum of 5*s.*, were also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator

applied for the sum sued for from the defendant; the defendant declined to pay on the ground that he was not a shareholder.

The judge left two questions to the jury. 1. Was the letter of allotment of the 20th of October in fact posted? 2. Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative.

Judgment was entered for the plaintiffs on the authority of *Dunlop v. Higgins* (*supra*, p. 54).

The defendant appealed.

Finlay, for the defendant, contended that the defendant was not a shareholder. For it was necessary that the allotment of shares should be not only made but also communicated to the defendant; that a letter posted but not received was not a communication to the defendant, and that there was therefore no contract between the parties.

THESIGER, L.J. It is true that Lord Cottenham might have decided *Dunlop v. Higgins* without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest his judgment upon a principle which embraces and governs the present case. If so the Court is as much bound to apply that principle, constituting as it did a *ratio decidendi*, as it is to follow the exact decision itself.... Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered.... But if *Dunlop v. Higgins* were out of the way, *Harris' Case* (*supra*, p. 56) would still go far to govern the present. There it was held that the acceptance of the offer binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted.... How can a casualty in the post, whether resulting in delay (which in commercial transactions is often as bad as no delivery) or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer.

There is no doubt that the implication of a complete contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to hardship. But such there must be at times on every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. An offerer, if he chooses, may always make the formation of the contract dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the

other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

BAGGALLAY, L.J. It has been established by *Dunlop v. Higgins* that if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery. The question in the present appeal is, whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed....

Having regard to passages in Lord Cottenham's judgment in *Dunlop v. Higgins*, it appears to me impossible to doubt that the proposition which was in fact his ratio decidendi, was this—that when the letter accepting the offer was duly posted, the contract was complete, although it might be delayed in its delivery or might never reach the hands of the party making the offer.

I however guard myself against being considered as participating in a view of the effect of *Dunlop v. Higgins* which has been sometimes adopted, viz. that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. On the contrary, I think that the principle established by that case is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized....

BRAMWELL, L.J....Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer; per Brian, C.J., and Lord Blackburn: *Brogden v. Metropolitan Ry. Co.*¹... If there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule, or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by

¹ 2 App. Cas. at p. 692. In the Year Books (17 Edw. IV., T. Pasch. case 2) the plea of a defendant justified the seizing of some growing crops because he said the plaintiff had offered him to go and look at them, and if he liked them, and would give 2s. 6d. for them, he might take them. Chief Justice Brian gives a very elaborate judgment, explaining the law of the unpaid vendor's lien, exactly as the law now stands, and he consequently says: "This plea is clearly bad, as you have not shewn the payment or the tender of the money. Moreover, your plea is utterly naught, for it does not shew that when you had made up your mind to take them you signified it to the plaintiff. Your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is. But I grant you this, that if in his offer to you he had said, Go and look at them, and if you are pleased with them signify it to such and such a man; and if you had signified it to such and such a man, your plea would have been good, because that was a matter of fact."

sending the article offered to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place; and in the same way there might be an agreement that dropping a letter in a post pillar box should suffice. As there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post office is employed as the means of communication.

But if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. If, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post, e.g., notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter which, however, does not reach me, that he has communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man is in the habit of sending cheques to his banker by post, and posts a letter containing cheques which never reaches. Is the banker liable? Would he be if this was the first remittance of the sort? Bankers may have recognised this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable¹ with that?...That because a man, who may send a communication by post or otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it. It is simply arbitrary. Suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to grant a lease, is the bargain completed?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post office is no more authorized by the offerer than the sending an answer by hand, and all these hardships *would* befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party? It was said that if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post; not that the letter can be got back, but its arrival might be anticipated by a telegram, and there is no case to shew that such anticipation would

¹ [EDITOR'S NOTE. In *Pennington v. Crossley*, a customer had for twenty years habitually paid for a merchant's goods by cheques sent by post. The Court of Appeal held (July 14, 1897) that it would be "most monstrous" to infer that the merchant had agreed to treat posting as a delivery of the cheque to him and so take the risk of the letter miscarrying. Contrast 3 T.L.R. 182; an implied *request*.]

not prevent the letter from binding. It would be most alarming to say that it would [bind]; that a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was wrong and was recalled¹.

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. There was no such communication. Posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post office. The difficulty has arisen from a mistake as to what was decided in *Dunlop v. Higgins*, and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "your answer by post is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? If Brian, C.J., had had to decide this, a public post being instituted in his time, he would have said "the law is the same, now there is a post, as it was before," viz., a communication to affect a man must be a communication, i.e. must reach him.

Judgment affirmed.

HENTHORN v. FRASER.

COURT OF APPEAL. 1892.

L.R. [1892] 2 Ch. 27.

[*Acceptance by post—Time of acceptance—Withdrawal of offer.*]

* * * * *

LORD HERSHELL. This is an action for the specific performance of a contract to sell to the plaintiff certain house property. The learned Vice-Chancellor of the County Palatine of Lancashire, gave judgment for the defendants. On July 7th, 1891, the secretary of the building society whom the defendants represent handed to the plaintiff, in the office of the society, a letter in these terms: "I hereby give you the refusal of the Flamank Street property at £750 for fourteen days." The plaintiff had been for some time in negotiation for the property, and had on two previous occasions made offers for the purchase of it, which were not accepted by the society. These offers were made by means of letters, written by the secretary in the office of the society, and signed by the

¹ [EDITOR'S NOTE. This point has never yet (A.D. 1921) arisen for decision in England; but it is the current opinion that logic would compel our courts to hold such a letter to be binding, "alarming" though the resultant inconvenience might be. See the authorities collected in Chitty on Contracts, 16th ed. p. 18. Cf. what was said by Mellish, L.J., in *Harris' Case*, *supra*, p. 58.]

plaintiff there. The plaintiff resided in Birkenhead, and he took away with him to that town the letter of July 7th containing the offer of the society. On July 8th a letter was posted in Birkenhead at 3.50 P.M., written by his solicitor, accepting on his behalf the offer to sell the property at £750. This letter was not received at the defendants' office until 8.30 P.M., after office hours, the office being closed at 6 o'clock. On the same day a letter was addressed to the plaintiff by the secretary of the building society in these terms: "Please take notice that my letter to you of the 7th inst. giving you the option of purchasing the property Flamank Street, for £750, in fourteen days, is withdrawn and the offer cancelled." This letter was posted in Liverpool between 12 and 1 P.M., and was received in Birkenhead at 5.30 P.M. It will thus be seen that it was received before the plaintiff's acceptance had reached Liverpool, but after it had been posted. On July 8th the secretary of the building society sold the same premises to Mr Miller for the sum of £760, but the receipt for the deposit paid in respect of the purchase stated that it was subject to being able to withdraw the letter to Mr Henthorn giving him fourteen days' option of purchase.

If the acceptance by the plaintiff of the defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. A person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them and not on the letter being posted. *Dunlop v. Higgins* is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post, but handed to the plaintiff in the defendants' office. The question therefore arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the *Household Fire and Carriage Accident Insurance Company v. Grant* (*supra*, p. 61) Lord Justice Baggallay said: "I think that the principle established in *Dunlop v. Higgins* is limited to cases in which by reason of general usage, or of the relations between the parties, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer (which by its terms was to remain open for some days) with him to his place of residence. Those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as

the letter containing it is posted as resting upon an implied authority, by the person making the offer, to the person receiving it to accept by those means. It strikes me as somewhat artificial....I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of *Dickinson v. Dodds* (*supra*, p. 49) was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer; which, in my judgment, distinguishes it entirely from the present case.

KAY, L.J....Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post. Is that a proper inference in the present case? I think it is. One party resided in Liverpool, the other in Birkenhead. The acceptance would be expected to be in writing, the subject of purchase being real estate. These warrant the inference that both parties contemplated that a letter sent by post was a mode by which the acceptance might be communicated. I think, therefore, that we are bound by authority to hold that the contract was complete at 3.50 P.M. on the 8th of July, when the letter of acceptance was posted, and before the letter of withdrawal was received.

Then what was the effect of the withdrawal by the letter posted between 12 and 1 the same day, and received in the evening? Did that take effect from the time of posting? It has never been held that this doctrine applies to a letter withdrawing the offer. A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received. No doubt there is the seeming anomaly that the same letter might contain an acceptance, and also a notice or offer as to other property, and that when posted it would be effectual as to the acceptance, and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor has done all that he was bound to do by posting the letter; but this cannot be said as to the notice of withdrawal. The person withdrawing was bound to bring his change of purpose to the knowledge of the said party. As this was not done, in this case, till after the letter of acceptance was posted, I am of opinion that it was too late.

Decree for specific performance.

[EDITOR'S NOTE. It is well settled in the United States, and in all probability would also be held in England, that the rule here laid down about posting a letter would equally apply to despatching a telegram. An offer would be effectually accepted by delivering to the telegraph-office for transmission the telegram of acceptance. That delivery would be treated as equivalent to delivery to the offeror,

even if the telegram did not arrive until after a retraction of it had been sent. See *Wester v. Casein Co.* (206 N.Y. 506, American Annotated Cases of 1914, B. 377).

Delivering the letter of acceptance to a postman in the street, for *him* to post it, is not a posting of it. For he has no authority from the postal authorities to receive letters on their behalf; and, indeed, is forbidden to do so. *Re London and Northern Bank* (L.R. [1900] 1 Ch. 220).]

BYRNE & CO. v VAN TIENHOVEN & CO.

COMMON PLEAS DIVISION. 1880.

L.R. 5 C.P.D. 344.

[*Acceptance before receipt of a letter withdrawing offer.*]

ACTION tried at Cardiff assizes, before Lindley, J., without a jury.

LINDLEY, J. This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tin-plates, pursuant to an alleged contract.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on the 1st of October, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on the 11th and 15th of October respectively. [The letter of the 1st of October, 1879, contained a reference to the price of tinplates branded "Hensol," and the "offer of 1000 boxes of this brand 14 x 20 at 15s. 6d. per box f.o.b. here, with 1 per cent. for our commission; terms, four months' bankers' acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here." The answer was a telegram from the plaintiffs sent on October 11th: "Accept thousand Hensols." On the 15th of October, 1879, the plaintiffs wrote to the defendants: "We have to thank you for your valued letter under date 1st inst., which we had on Saturday P.M., and immediately cabled acceptance of the 1000 boxes 'Hensols,' 1c. 14/20 as offered. Against this transaction we have pleasure in handing you herewith the Canadian Bank of Commerce letter of credit No. 78, October 13th, on Messrs A. R. McMaster & Brothers, London, for 1000l....Will thank you to ship the 1000 'Hensols' without delay."] These letters and telegram would, if they stood alone, plainly constitute a contract binding on both parties. The defendants in their pleadings say that there was no sufficient writing within the Statute of Frauds, and that they contracted only as agents; but these contentions were very properly abandoned as untenable. The defendants, however, raise two other defences to the action. First, they say that the offer made by their letter of the 1st of October was revoked by them before it had been accepted by the plaintiffs. For on October 8th the defendants sent by post to the plaintiffs a letter withdrawing their offer of the 1st. This letter reached the plaintiffs on October 20th. [On the same day the plaintiffs telegraphed to the defendants demanding shipment, and sent them a letter insisting on completion of the contract. On October 25th the defendants, refusing to complete, acknowledged the receipt of the cable message of the 20th,

inclosed the credit note sent in the letter of the 15th, and added, "Our offer having been withdrawn by our letter of the 8th inst. we now return the above credit for which we have no further need; but take this opportunity to observe that in case of any future business proposals between us, we must request you to conform to our rules and principles, which require bankers' credit in this country, whereas the firm of A. R. McMaster and Brothers are not classified as such."]

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not: *Routledge v. Grant* (4 Bing. 653). For the decision of the present case, however, it is necessary to consider two other questions, viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent? Neither of these questions appears to have been actually decided in this country.

As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States, and it appears to me much more in accordance with the general principles of English law than the view maintained by Pothier.

I pass, therefore, to the question whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It is now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted; even although it never reaches its destination: *Harris' Case* (*supra*, p. 56); *Dunlop v. Higgins* (*supra*, p. 54). When, however, the authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has (expressly or impliedly) assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself. In other words, he has made the post-office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter. And there is no legal principle which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiffs on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs

they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on October 11th, when the plaintiffs accepted the offer of the 1st (which they had no reason to suppose had been withdrawn). If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. Both legal principles and practical convenience require that a person who has accepted an offer, not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

The defendants' next defence is that, as the plaintiffs never sent a banker's acceptance as stipulated in the contract, they cannot maintain any action for its breach. And although the plaintiffs sent letters of credit which were practically as good as a banker's acceptance, yet I cannot say that they did in fact send a banker's acceptance. By the terms of the contract bankers' acceptances on London or Liverpool were to be sent against—i.e. were to be exchanged for—shipping documents; and if the defendants had been ready and willing to perform the contract on their part on receiving proper bankers' acceptances, I should have been of opinion that the plaintiffs would not have sustained this action. But it is perfectly manifest from the correspondence that the defendants did not refuse to perform the contract on any such ground as this....The defendants do not return the letter of credit, on Oct. 25th, because it is not a banker's acceptance, but because the offer was withdrawn; and the inference I draw is that if the offer had not been withdrawn the defendants would not have returned the letter of credit, although in future transactions they might have been more particular....On the other hand, I am satisfied that if the defendants had taken this ground the plaintiffs would have sent bankers' acceptances in exchange for shipping documents, that the plaintiffs always were ready and willing to perform the contract on their part, although they did not in fact tender proper bankers' acceptances.

It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting and could not treat the defendants as having broken it. But, when the plaintiffs found that the defendants were inflexible, and would not perform the contract at all, they had, in my opinion, a right to treat it as at an end and to bring an action for its breach. It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. As the plaintiffs, when the defendants first refused to perform the contract, did not treat that refusal as a breach, the plaintiffs cannot now treat the contract as broken at the time of such refusal. But I have found no authority to shew that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as

a breach of it by the defendants. On the contrary *Ripley v. McClure* (4 Ex. 345), and *Cort v. Ambergate Ry. Co.* (17 Q.B. 127), shew that the continued refusal by the defendants operated as a continued waiver of a tender of bankers' acceptances and enables the plaintiffs to sustain this action. It is not necessary to determine exactly when the contract can be treated by the plaintiffs as broken by the defendants. It is sufficient to say that whilst the plaintiffs were always ready to perform the contract on their part the defendants wrongfully and persistently refused to perform the contract on their part; and that before action there was a breach by the defendants not waived by the plaintiffs.

Judgment for plaintiffs.

[EDITOR'S NOTE. See the cognate decision in *Stevenson v. McLean* (L.R. 5 Q.B.D. 346).]

ROOKE v. DAWSON.

CHANCERY DIVISION. 1895.

L.R. [1895] 1 Ch. 480.

[*Scholarship—Offer or Invitation to offer.*]

THE plaintiff in this action claimed a declaration that he was entitled to the possession and enjoyment of a scholarship founded by a trust deed of January, 1854, of which the defendants were the present trustees.

By the deed of 1854 it was provided that the trustees for the time being should at all times thereafter stand possessed of a capital sum of £1000, and the securities or property in or upon which the same might from time to time be invested, as a fund or endowment for the support of a scholarship in connection with the Protestant Dissenters' Grammar School at Mill Hill, Hendon, to be called the Bousfield Scholarship, subject to (amongst others) the following rules: (1st) That the scholarship should be of the value of such net yearly income as the said capital sum of £1000 when invested should produce. (2nd) That it should be tenable for three years from the time of the scholar elect entering at one of the colleges thereafter mentioned, provided he should continue his studies at such college as aforesaid....(6th) That on any avoidance thereof, except as in the 8th rule mentioned, the scholarship should be awarded to the pupil leaving Mill Hill School, and going to such college as aforesaid, who should pass the best examination in subjects to be determined upon from time to time by the examiner or examiners for the scholarship. ...(8th) That when any vacancy should occur, by death or other means, within a period of three years from the last avoidance of the scholarship, if no half-yearly payment should have become due to the scholar elect so avoiding it, then the next highest boy at the last examination who was duly qualified to hold the scholarship should succeed thereto, but if there should be no such boy, or if any half-yearly payment should have been made or become due to the scholar so avoiding the scholarship, the scholarship should remain vacant till the following June.

In June, 1893, the scholarship having become vacant, an examination was held by examiners duly appointed. At this examination the plaintiff

and three other duly qualified candidates presented themselves, and as the result of the examination, the plaintiff was placed third in order of merit. In September, 1893, the candidate who had been placed first in the examination resigned the scholarship. But the defendants did not give notice of such resignation to the next highest candidate, nor award him the scholarship; they announced instead that another examination would be held in the year 1894. An examination was accordingly held in June, 1894, by a duly appointed examiner; and two duly qualified candidates presented themselves, namely, the plaintiff and another. The plaintiff passed the best examination, obtaining 570 marks, while the other candidate obtained only 496 marks. The plaintiff duly entered as a student at University College, London, on the first day of the October term, 1894, and was still pursuing his studies at that college. By a deed poll of November, 1894, the candidate who had been second in the examination of June, 1893, renounced all interest in the said scholarship.

The plaintiff submitted that, under the circumstances above stated, he was entitled to the enjoyment of the said scholarship; and alleged that he had applied to the defendants to award the same to him accordingly, but that the defendants refused to award the said scholarship to him, or to recognise any right or title of the plaintiff in or to the same.

The writ was issued on the 18th of December, 1894, the footnote stating that the defendants were sued as trustees.

The defendants now moved to stay all further proceedings, on the ground that an order of the Charity Commissioners, authorizing the action, had not been obtained under sect. 17 of the Charitable Trusts Act, 1853.

* * * * *

CHITTY, J. The plaintiff has argued at the Bar, that he has a case of contract against the defendants....a contract, such as is found in the cases of an offer of a reward or the like. There, when a public offer is made to all the world, proposing that some service should be done, and the service is performed, there is a contract in point of law. There may be offers not resulting, when the offer is accepted, in a contract. An excellent illustration of that proposition is offered by *Spencer v. Harding* (*supra*, p. 8), where the circular was a mere proclamation that the defendants were ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. Applying the principles of that case to the present, is there a contract? In my opinion there is nothing more than a proclamation that an examination for a scholarship will be held. There is no announcement that the scholarship will be awarded to the scholar who obtains the highest number of marks. Consequently by coming in and submitting to the examination the plaintiff did not do that which resulted in a contract. It is plain the plaintiff could not state that the announcement included the term that the scholarship would be awarded, in all events, to the boy who got the highest number of marks. The announcement was simply the announcement I have stated; and it was not coupled with any statement to the effect that the boy who had the greatest number of marks should have the scholarship.

The learned counsel for the plaintiff argued that they were entitled to eke out this imperfect statement, on which alone the supposed contract is founded, by reference to the trust deed. But the trust deed is not imported into the announcement of the examination to be held. When the case is considered on its merits, the meaning is, that according to the charity deed, the defendants were bound to award the scholarship to the boy who had the greatest number of marks. That is a distinct question, and that question necessarily involves the administration of the trusts of the charitable deed. I am far from saying that if the plaintiff had made out a case of contract, such as would have justified his suing in an action at Common Law, he could have maintained this claim. But it is not necessary to press that matter now, because I hold that the case presented by the statement of claim, deliberately and carefully framed, does not present a case of contract.

[His Lordship further decided that the certificate of the Charity Commissioners was necessary before the action could be proceeded with.]

Proceedings stayed.

NOTE

DEATH OF OFFEROR OR OF OFFEREE.

The English rule (*supra*, p. 52) on both these points is followed in the United States. "A dead man can no more continue to offer than he could begin to offer." "After an offeree's death, his executors cannot make up his mind for him." And it is there also held that the fact that the acceptance was made before the offeree had become aware that the offeror was dead, will not render such an acceptance valid; *Wallace v. Townsend* (54 Am. Rep. 829). This point would probably be ruled similarly in England; although (*supra*, pp. 64, 65) the *voluntary* withdrawal of an offer is ineffectual till brought to the knowledge of the offeree.

The present German Civil Code (art. 153), however, departing from the older German law and the present French law, provides that an acceptance is *not* invalidated by the previous death of the offeror, unless he is shewn to have intended that it should be.

CHAPTER II

FORM OF CONTRACT

SECTION I

CONTRACT UNDER SEAL

XENOS AND ANOTHER APP. WICKHAM RESP.

HOUSE OF LORDS. 1867.

L.R. 2 E. & I. APP. 296.

[Promise by deed—Delivery—Acceptance presumed¹.]

THIS was an appeal against a decision of the Court of Exchequer Chamber (14 C.B. (N.S.) 435), which had affirmed a decision of the Court of Common Pleas, in an action on a time policy on a ship.

The appellants are shipowners, and as such were the owners of the ship *Leonidas*. The respondent is the chairman and representative of the Victoria Fire and Marine Insurance Company. The declaration alleged that the plaintiffs caused their vessel to be insured by this company for the space of twelve months, from April 25th, 1861, to April 24th, 1862, on a policy valued at £1000, upon a ship valued at £13,000, and the loss was alleged to have occurred by perils of the sea. There was also a count in trover for the policy.

The defendant, Wickham, pleaded several pleas. The first denied the insurance as alleged; the fourth stated that after the making of the policy the same remained, with the plaintiffs' consent, in the hands of the defendant, and whilst it so remained, and before the loss, the plaintiffs requested the defendant, for the purpose of putting an end to the policy, to cancel the same and make a return to the plaintiffs of the premium; that, in compliance with such request, and before the loss, the defendant did cancel the policy. To the count in trover the defendant pleaded Not guilty and Not possessed.

Issue was taken on all these pleas, and the cause was tried before Erle, L.C.J., when it appeared that on April 25th, 1861, the plaintiffs employed Mr Lascaridi, an insurance broker, to effect for them a policy on the ship for £2000, at £8. 8s. per cent., from the 25th of April to the 25th of October. In the case of private underwriters at Lloyd's, it is customary to have only one slip; which is signed by the different underwriters for the amounts for which they are willing to undertake the insurance. In the case of insurance companies a separate slip is prepared by the brokers of the assured for each company; and the policy is afterwards prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker.

¹ [EDITOR'S NOTE. Cf. *Buller's Case* (3 Coke's Reports 28): "If A make an obligation to B, and deliver it to C to the use of B, this is the deed of A presently... But B may refuse it...and thereby the obligation will lose its force."]

Lascaridi prepared a slip embodying the terms of the proposed insurance, and got it initialed by a clerk of the company, for the sum of £2000. This was left at the office of the company in order that the policy might be made out. Before the policy was made out, the plaintiffs sent to Lascaridi a letter desiring him to "cancel *Leonidas* insurance, and insure the same for all the year and for all seas at £10. 10s. per cent." On April 30th Lascaridi called at the respondent's office, and stated that he did not wish for the policy already mentioned, but desired to effect another. The slip for the insurance for £2000 for six months was then destroyed, and another slip was prepared by him, and initialed by the respondent's clerk, on the *Leonidas* for £1000 for twelve months, from April 25th, 1861, on "hull, stores, and machinery, valued at £13,000." On the 1st of May Lascaridi sent to the plaintiffs an account debiting them with the sum of £338, as payable by them in respect of insurances on the *Leonidas*, and drew on them, as of that date, for that sum at three months. They accepted the bill; and, when they did so, Lascaridi told them that the policy would be ready in a day or two. This bill was paid at maturity. In the course of a few days afterwards a policy was filled up from the slip, and was dated May 1st, 1861.

The custom, as between insurance companies and insurance brokers, is for the companies to give credit to the brokers for the premiums, debiting them in account with the amount of such premiums; and when insurances are effected (as this was) on cash account, all premiums for insurances effected during each month are payable on the 8th of the succeeding month. Just before the expiration of this credit, a debit note is sent to the broker; with a statement of the amount of the premiums due, less a discount and a brokerage at 15 per cent. On the 8th of June a debit note was sent from the respondent's office to Lascaridi. On its being presented, Lascaridi's clerk said that no premium was due; and, upon a second messenger being sent with the policy (which was expressed to be duly "signed, sealed, and delivered") and the debit note, the clerk repeated the statement, and said that the policy ought not to have gone forward. In the course of the day one of the clerks of Lascaridi called at the office of the company, and said that the policy had been put forward in error, and requested that it should be cancelled. A memorandum of cancellation was thereupon indorsed on the policy in these terms: "Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto." This memorandum was signed by two directors, witnessed, and registered in the regular way. The debit against Lascaridi for the premium was cancelled, but he was charged with the stamp, and the policy was handed to his clerk, with the memorandum of cancellation thereon, that he might, if he could, obtain from the stamp office a return of the stamp duty. On the morning of September 2nd, Lascaridi's clerk called at the office of the company with the policy, said that the cancellation had been made by mistake, and wished the policy to be reinstated. He was informed that if the ship was safe, and not in the Baltic, there would be no objection, and he was requested to call again for an answer. At twenty minutes past eight o'clock on the morning of that day a telegram had

been received at Lloyd's, stating that the *Leonidas* was stranded on the Nervo, but this intelligence was not known to the respondent till three o'clock in the afternoon of that day. The reinstatement of the policy was then refused. It was admitted that the appellants had not, in fact, authorized the cancellation of the policy, nor did they ever receive back from Lascaridi any part of the premium, or any credit for the same.

The Lord Chief Justice directed a verdict for the defendant, but reserved leave to the plaintiffs to move to enter a verdict for them if the Court should be of opinion that the policy was binding on the company, and had been cancelled without authority. A rule to that effect having been obtained, it was, after argument, discharged; and this decision was confirmed on appeal to the Exchequer Chamber. The present appeal was then brought.

The Judges were summoned; and several attended.

Bovill, Q.C., for the defendant. There was no policy here under the hands and seals of the company at the time of the loss. Payment of the premiums was to be made by the plaintiffs through Lascaridi. The bill to make that payment was drawn in May, it had four months to run, and the date at which it was to become payable was actually subsequent to the date at which the ship was lost, and was long subsequent to the time at which the policy had been repudiated. The respondent never received any payment—the broker was, indeed, at one time debited to him in the books of the company, but that was nothing without the broker's assent; and so far from giving that assent, he denied all liability to pay the premium, and stated that the policy ought not to have gone forward. That occurred on the 8th of June; and as the underwriter always looks to the broker, the policy then came to an end. A memorandum of cancellation was made on the policy, and though the policy was left with the broker, it was left not as a delivery of it, as a policy, to him, as the broker for the assured, but merely to enable him to get a return of the stamp duty. This, so far from being an acknowledgment of liability, was a distinct declaration that no liability existed. The broker was the avowed agent of the plaintiffs, and they were bound by his acts. The defendant's company was not a corporation, but even if it had been, that would not have made the affixing of the seal to the policy binding on the company, unless that act had been done with a distinct intent to that effect: *The Derby Canal Company v. Wilmot* (9 East 360). Nothing was done here which would bring the case within *Doe d. Garnons v. Knight* (5 B. & C. 671), where there had been a formal affixing of the seal, and a formal delivery of the document as the deed of the party. Here it was only proposed to be delivered, and on that proposal it was repudiated. It never was delivered, and has never been in the possession of the appellants as a deed accepted by them. That acceptance was necessary to make it binding on the insurers, for the appellants were at liberty, up to the last moment, to object to the terms of the deed and to repudiate it. It was never intended to be absolute till accepted by the other party, and by him it was repudiated and rejected.

The writing of the terms on the slip was not all that was necessary

to constitute the contract. The premium was to be paid, and the policy was to be accepted. Neither of these things was done. Under such circumstances, the analogy to a bill of exchange [which can be revoked at any time before it is delivered] is good, and the consideration not being paid, and the instrument not being delivered, no liability can possibly arise upon it. The terms of the proposed contract were not adopted by the appellants, and they, not having accepted it, cannot now claim the advantage of it.

The following question was put to the Judges:

"Whether, on the facts stated, the Company was, when the ship *Leonidas* was lost, liable as insurer to the plaintiffs on the policy, or alleged policy? It is to be assumed that the *Leonidas* was totally lost on the 1st of September, 1861." Two judges answered it in the negative, and three in the affirmative.

MR BARON PIGOTT....The whole difference between the parties has obviously arisen from the fraudulent conduct of Lascaridi, the plaintiffs' broker; but it is equally clear that they are not to be held responsible for, nor ought their rights to be affected by, it. The authority with which Lascaridi was invested by the plaintiffs was that of a broker employed to effect an insurance in the ordinary manner; with this additional circumstance only, that after he had bespoke the policy, and before it was filled up from the slip, he had express authority to procure an alteration in the terms of insurance. The policy...purports to have been signed, sealed, and delivered in the presence of a witness; it was therefore in form complete. In that state it continued in the custody of the defendant until the 8th of June. At the instance of Lascaridi the defendant was induced to cancel the policy, on the representation that it had been "put forward in error." This (as we now know) was a false statement on the part of Lascaridi. It is on the circumstance of the policy remaining in the hands of the defendant, as above stated, that the question depends, whether the transaction constituted a complete contract in law and fact, or not. I am of opinion that it was complete....The defendant acted upon the policy as a perfected transaction, when, on the 8th of June, he demanded payment of the premium for which he had given credit to the broker. In the face of this demand it seems startling that the defendant can be heard to say that there was no complete contract subsisting at that period.

MR JUSTICE MELLOR....The policy was prepared by the defendant in conformity with the instructions of the plaintiffs; by the mode of dealing between the plaintiffs' broker and the defendant, the amount of the premium and the stamp must, as against the defendant, be treated as paid; the policy was duly executed and delivered as a deed by the defendant, and was merely kept in his custody until called for by the assured or their broker. The plaintiffs were bound by it; because it was prepared in conformity with their instructions. The defendant was bound by it, because he had accepted the terms and mode of payment of the premium and stamp, and acted upon the instructions of the plaintiffs, and had done everything which he intended to do by way of execution and delivery of the policy as a deed.

THE LORD CHANCELLOR (Lord Chelmsford)...

My Lords, the difference of opinion which has prevailed amongst the learned Judges in this case must necessarily diminish the confidence which I feel in the judgment I have formed upon it, more especially as that judgment is not in accordance with the views of the majority of the Judges.

The question is one more of fact than of law; and therefore, in considering it, it will be necessary to refer to the facts contained in the special case: [His Lordship stated them very fully].

The usage with respect to premiums upon insurances effected by brokers is clearly explained by Bayley, J., in *Power v. Butcher* (10 B. & C. 329). He says: "According to the ordinary course of trade the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter (to whom in most instances the assured are unknown) looks to the broker for payment; and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter."

The questions which arise out of the facts of the case are: 1st Whether there was a complete contract of insurance between the parties? and, 2nd, If there was a complete contract, whether it was afterwards cancelled by the plaintiffs' authority?

Upon the first question we have no evidence of the fact of the execution of the policy, except that which arises upon the face of the instrument itself; which...policy purports to be signed, sealed, and delivered by two of the directors of the company in the presence of the resident secretary. This statement on the face of the policy that all acts were done to render the execution complete, which is acknowledged by the directors who executed it, must be taken to be conclusive against the company, that it was not only signed and sealed, but also delivered. We all know the formal mode of executing a deed by the words, "I deliver this as my act and deed"—a form which, no doubt, or something equivalent to it, was observed upon this occasion. The policy, most probably, was afterwards given to the secretary, to be kept till called for. Now, although the policy was thus retained by the officers of the company, when formal execution of it had taken place, they held it for the plaintiffs, whose property it became from that moment. It is a mistake to suppose, as some of the learned Judges have done, that the policy wanted its complete binding effect till it was delivered to and accepted by Lascaridi. The usage of insurance companies, to keep the policy until sent for by the assured or his broker, is not for the purpose of completing the instrument by a delivery personally to the party or his agent, but merely as a matter of convenience. And as to Lascaridi's acquiescence and acceptance being necessary to complete the contract, I apprehend that there is no ground for such an opinion. He was the broker and agent to the plaintiffs, to effect an insurance upon their vessel upon certain terms dictated by them. When the policy was executed, in exact conformity to his instructions, his duty was so far discharged; and without the

authority of the plaintiffs he could not refuse to accept it. They had effected, through their agent, a complete binding contract, which they alone could have a right to abandon.

Upon the second question, as to the supposed cancellation, all the Judges seem to have thought that if the contract was binding, Lascaridi had no authority to cancel it. The company could not have been led from anything in the previous transaction respecting the same vessel, to suppose that Lascaridi was authorized to act beyond the ordinary scope of the authority of a broker. It is one thing to cancel a slip, which is merely the inception of a contract, and to change the terms of the proposal for an insurance; and an entirely different thing to release the underwriters from their liability upon a policy. Lascaridi had no authority from the plaintiffs to relinquish on their behalf the benefit of a contract to which they were entitled; and the company had no reason to suppose that he possessed any such authority.

LORD CRANWORTH....The efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute; and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow.

It is not the practice that the assured should call for or examine the policy before he takes it away, but that he should *send* for it, evidently treating it as an instrument complete before it is taken away from the office. I know of nothing intermediate between a deed and an escrow. If the policy, when signed, sealed, and delivered by the directors, does not thereby immediately become the deed of the company, I do not see when and how it afterwards acquires that character. The practice is, that it should be kept by the company till "sent for" by the assured or his broker; not till the assured has had an opportunity of examining it, so as to ascertain that it is conformable to the slip....It surely cannot be doubted that the company would be liable on the policy actually executed, if a loss should occur while the policy remains in the office, in consequence of the assured having carelessly forgotten to send for it. This can only be, because it had been completely executed, though never seen and approved by the assured. If the usage had been that it should, after being signed, sealed, and delivered, remain in the hands of the secretary till the assured had done some act signifying his approbation of it, that might have raised a question whether, until that approbation, it was more than an escrow. But no such usage is stated. On the contrary, the thing sent for by the assured or his broker is clearly looked to as something complete before it is taken from the office.

Judgment given for plaintiff.

[EDITOR'S NOTE. Cf. *Roberts v. Security Co.* (L.R. [1897] 1 Q.B. 111).]

CLARKE AND ANOTHER v. THE GUARDIANS OF THE CUCKFIELD UNION.

QUEEN'S BENCH. 1852.

21 L.J.R. Q.B. 349.

[Corporation—Contract not under Seal—Necessary Purposes.]

THE demand was for some water-closets, put up by the plaintiffs at the Cuckfield Union Workhouse, by the direction of the defendants. There was no contract under seal. The plaintiffs obtained a verdict for 12l. 15s.; with liberty to the defendants to move to enter a nonsuit, on the ground that there was no agreement under seal.

Hance, in support of the rule.—A trading corporation stands in a different position from a municipal corporation, with respect to parol contracts for matters incidental to the purposes of its existence. The guardians of the poor are incorporated, among other things, for the erection of union workhouses. If the argument on the other side be correct, that a corporation may contract without seal for all purposes incident to its creation, the defendants might have contracted for the building of the workhouse by parol. There was no pressing necessity here. The corporation might have been called together for the purpose of affixing the corporate seal to the contract. The weight of the authorities is in favour of the proposition maintained by the defendants—*The Mayor, &c. of Ludlow v. Charlton* (6 M. & W. 815), *Diggle v. London and Blackwall Railway Company* (5 Exch. 442).

WIGHTMAN, J....The injustice of allowing the defendants to have the benefit of the work done by the plaintiffs without paying for it, makes it the more necessary to inquire strictly, whether the general rule of law applies to this case, or whether it falls within any exception which may enable the plaintiffs to recover. It is no doubt a rule of law that a corporation aggregate can only contract under seal. So much inconvenience, however, arises from the strict application of the rule, that it was in very early times relaxed with respect to small matters of frequent and ordinary occurrence. This relaxation of the rule has been gradually extended; and it may now be considered that the general rule admits of an exception in cases where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created. In *The London Gaslight Company v. Nicholls* (2 C. & P. 365) Best, L.C.J., held that assumpsit might be maintained by the company for gas supplied, observing that "it was quite absurd to say that there was any necessity for a contract by deed in such a case."... In *Church v. Imperial Gaslight and Coke Company* (6 Ad. & E. 486), the company brought an action against Church upon an executory contract by them to supply gas, which Church refused to accept. In the judgment, Lord Denman assumes that it is established that a corporation may sue or be sued in assumpsit upon executed contracts of a certain kind, amongst which are included such as relate to the supply of articles essential to the purposes for which it is created. In *Beverley v. The Lincoln Gaslight and Coke Company* (6 Ad. & E. 829), the action was for the price of gas-meters, supplied by the plaintiff to the company under a parol contract.

It was decided that the action was maintainable, and the company liable, though there was no contract by deed....In *Sanders v. Guardians of St Neot's Union* (8 Q.B. 810), the Court held that an action was maintainable in respect of a demand by the plaintiff for iron grates, supplied to the workhouse by the direction of the guardians, and executed there under a verbal order; and in giving judgment, Lord Denman observes that the defendants could not be permitted to take the objection that there was no contract under seal, if the work, when done, was adopted by them for purposes connected with the corporation. In the late case of the *Copper Miners Company v. Fox* (20 L.J.R. Q.B. 174) it was held, that the company could not maintain an action on an executory parol contract relating to the furnishing of iron rails, on the ground that the contract was not incidental or ancillary to carrying on the business of copper miners, and did not fall within any of the exceptions to the general rule. Lord Campbell observed that "Had the subject-matter of this contract been copper, or if it had been shewn in any way to have been ancillary to carrying on the business of copper miners, the contract would have been binding, though not under seal. For where a trading company is created by charter, whilst acting within the scope of the charter, it may enter into the commercial contracts usual in such a business in the usual manner." The result of the cases appears to be, that whenever a corporation is created for particular purposes, which involve the necessity for frequently entering into contracts for goods or works essentially necessary for carrying the purposes for which the corporation is created into execution, a demand in respect of goods or works which have actually been supplied to and accepted by the corporation, and of which they have had the full benefit, may be enforced by action of assumpsit, and the corporation will be liable though the contract was by parol only, and not by deed....

It would have avoided the uncertainty which now exists, if the old rule had never been relaxed; but being as it is, the question is whether the demand in question comes within any of the recognised exceptions to the general rule. I am disposed to think it does; and that wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that the formality of a deed was wanting, and say, "no action lies, we are not competent to make a parol contract, and we avail ourselves of our own disability."

Rule discharged.

[EDITOR'S NOTE. See this ruling recognised in *Lawford v. Billericay R.D. Council* (L.R. [1903] 1 K.B. 772).]

THE SOUTH OF IRELAND COLLIERY COMPANY
v. WADDLE.

COMMON PLEAS. 1868.

L.R. 3 C.P. 463.

[Trading Corporation—Contract not under seal.]

[THE declaration claimed damages for breach of an agreement to deliver certain machinery which the plaintiffs had purchased of the defendant and partly paid for.

The plaintiffs were a company incorporated under the Companies Act, 1862, for the purpose (as expressed in the memorandum of association) of acquiring certain collieries in the county of Kilkenny, and working the said collieries and generally doing and executing all acts and things incidental to the objects aforesaid, or any of them.

By the articles of association, clause 3, it was provided that the business of the company should include the several objects expressed in the memorandum of association, and all matters which from time to time might appear to the directors expedient for attaining those objects.

Clause 4 provided that the business should be carried on by or under the management of the directors, subject only to such control of meetings as was provided by those presents.

The directors having advertised for tenders for the construction of machinery necessary to enable them to commence working, the defendant offered to construct the required engines and gearing for 1550*l*.

By a resolution of the board of directors the defendant's tender was accepted, with 50*l*. additional for the erection of the machinery. The defendant received from the company in cash 300*l*. and 200*l*., on account. But, after considerable delay, the defendant declined to deliver any part of the machinery unless security were given for payment of the remainder of the price. The plaintiffs' works were consequently delayed.

On the part of the defendant it was objected that the contract, not being under the seal of the company, was void as against them; and therefore not binding on the defendant, for want of mutuality. The case of *East London Waterworks Company v. Bailey* (4 Bing. 283) was relied on.

A verdict was taken for the plaintiffs (damages 500*l*.), leave being reserved to the defendant to move to enter a verdict for him or a nonsuit, if the Court should be of opinion that the contract required a seal.

BOVILL, C.J....Originally all contracts by corporations were required to be under seal. From time to time exceptions were introduced; but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants. But, in progress of time as new descriptions of corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions. These exceptions apply to all contracts by trading corporations entered into for the purposes for which

they are incorporated. A company can only carry on business by agents—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument. It can never be that one rule is to obtain in the case of a contract for 50*l.* or 100*l.*, and another in the case of a contract for 50,000*l.* or 100,000*l.*....But, as soon as the exception became extended to trading corporations, it was applied to drawing and accepting bills to any amount; and this shews that insignificance is not an element....

BYLES, J....In *Copper Miners Company v. Fox* [see p. 80, *supra*] the contract itself was entirely out of the scope of that company's incorporation. The articles of association of *this* company necessarily imply that they were to have machinery for the working of their mines. Upon this ground, therefore, independently of the other and more general ground, I think the plaintiffs are entitled to retain their verdict.

MONTAGUE SMITH, J....A pumping-engine was a thing proper and necessary for the purposes for which this company was incorporated, and therefore the contract for it was enforceable though not under seal....*East London Waterworks Company v. Bailey* can no longer be considered to be law.

Rule discharged.

[The judgment was affirmed by the Exchequer Chamber, L.R. 4 C.P. 617.

As regards those corporations which are companies created by Registration, section 76 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), provides that "Contracts on behalf of a company may be made as follows (that is to say):

(i) Any contract which, if made between private persons, would be by law required to be in writing, and (if made according to English law) to be under seal, may be made on behalf of the company in writing under the common seal of the company; and may in the same manner be varied or discharged.

(ii) Any contract which, if made between private persons, would be by law required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority express or implied; and may in the same manner be varied or discharged.

(iii) Any contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority express or implied; and may in the same manner be varied or discharged."]

SECTION II

STATUTE OF FRAUDS

GODWIN v. FRANCIS.

COMMON PLEAS. 1870.

L.R. 5 C.P. 295.

[Statute of Frauds—Contract by Telegram.]

[GODWIN wrote to Francis a signed letter offering him £10,500 for the Liddington Estate, already advertised for sale. Francis telegraphed to him, "Your offer for the Liddington Estate is accepted. Confirm yours by first post." In an action by Godwin to recover damages for misrepresentation of authority to sell, a verdict was taken for the plaintiff; subject to the question as to whether the telegram was a sufficient contract in writing to satisfy the Statute of Frauds.]

* * * * * * *

Lopes for defendant....It is incumbent on the plaintiff to prove a contract, such as would have bound the principals if Francis had had the authority which he represented himself to have. The telegram was signed by the telegraph company's clerk. He was not the agent of Francis for that purpose. Nor could an agent delegate to a third person his authority to make a contract.

[BOVILL, C.J. An auctioneer is agent for the purchaser and receives his name, and usually the clerk writes it down. That has, over and over again, been held to be a sufficient signature to satisfy the Statute.]

The note signed by Francis and sent to the telegraph office would not avail: because he only signed it as instructions to the telegraph clerk, not with the intention of binding himself to the contract.

BOVILL, C.J....It is contended that the instructions were signed by the defendant, not as a signature of the contract but as mere instructions to the clerk. Assuming that argument to be correct (though I am not prepared to adopt it) that would be instructions to the telegraph company to do that which in the ordinary course of their business is done. The ordinary course is...to transmit an exact copy....The [receiving] telegraph clerk copies it, signs it, and sends it to the plaintiff, the name of the seller appearing thereon....I am prepared to hold that the mere telegram written out and signed, in the way indicated, by the telegraph clerk, if done with the authority of the vendors, would have been a sufficient signature within the Statute of Frauds.

BRETT, J....I think there is evidence that the defendant, when he signed instructions, intended that to operate as his signature to the contract....And I think it must be assumed, as against him, that he had authority to delegate to the clerk the power to sign for him....In either point of view, therefore, there was a sufficient signature.

Rule refused.

[EDITOR'S NOTE. Initials, instead of the actual names, will be a sufficient signature (14 L.T. 433); or even a cross-mark by a man who cannot write (3 Mer. 2); or a signature impressed by a stamp or stencil (L.R. 3 C.P. 28); or even the name printed at the top of a sheet of paper, if the person charged writes some part of the document and so adopts the printed name (82 L.T. 117).]

FOWLE v. FREEMAN.

CHANCERY. 1804.

9 VESEY, 351.

[*Informal Agreement—Signature of one party only.*]

A MEETING took place between the plaintiff and defendant, at which after some negotiation the defendant wrote and signed a paper as follows: "March 12th, 1803. I agree to sell to Mr Fowle my estate, tithes, and manor at Chute Lodge, together with the wood, trees, and fixtures (except Cadley Cottage), for the sum of £27,000, upon the following conditions." Then followed conditions in favour of the tenant. This paper was not signed by the plaintiff. It was signed by the defendant; who, in the same paper, subjoined a letter to his solicitor; desiring him to prepare a proper agreement for Mr Fowle and him to sign, and to deliver to the bearer an abstract of his title deeds. The defendant afterwards refusing to complete the purchase, and countermanding his direction to the solicitor, the bill was filed; praying a specific performance. The defendant resisted the performance; first, on the ground, that the memorandum and letter were signed by him, not as an agreement for the sale, but merely as instructions for such agreement; the plaintiff not having signed the memorandum, nor done any other act on his part to bind himself. The second ground was, that the memorandum was signed by him under the effect of a misrepresentation of the plaintiff as to the tenant's claims.

Romilly, for the plaintiff, contended upon the Statute of Frauds, that, if the agreement was signed by the party to be bound, it would do; according to *Coleman v. Duck* (5 Vin. 527).

Alexander, for the defendant. Independent of the misrepresentation, there is no agreement in this case. Upon all the circumstances the defendant never meant to be bound alone; nor, till an agreement should be signed by both parties, according to the directions at the bottom of this paper. He never meant this to be delivered as an agreement. It is clear from the letter, he meant to have an agreement binding on both parties, and to have the aid of his solicitor....He had a right to introduce many stipulations; but according to the plaintiff's argument he could not have added any thing; or made even the slightest variation. If this paper was to be a binding agreement, why did not the plaintiff, who was present, sign it; why did it remain as a mere paper of instructions in the defendant's possession?...

The MASTER of the ROLLS. The objections made by the defendant are, 1st, that there is no agreement binding the parties: 2nd, that, supposing there is a binding agreement, the defendant is not to perform it; because a term was omitted, which he would have inserted but for the misrepresentation of the plaintiff. As to the first objection, it is clear. that early in the negotiation they had agreed upon all but the terms to

which the tenant was to be entitled from the purchaser. The price was agreed upon. A meeting took place, in order to settle those terms; the only thing remaining for the purpose of settling the agreement. At the meeting the terms are settled; and, if there is no objection upon the Statute of Frauds, what passed would have amounted to an agreement. Then the terms are reduced to writing. The whole was copied out fairly by the defendant, and he signs it. There is no doubt it was a complete agreement so far. The question is, whether the whole effect of it is suspended by adding to it a letter to his attorney, desiring him to prepare a more formal instrument¹. It is impossible that that letter could have such an effect. If it had, though that formal agreement had been prepared, he would not have been obliged to sign it; he might have sold the estate the next day for a higher price. At least it amounts to this; that, if prepared, he should execute that more formal agreement. The attorney could not introduce the least variation by his direction. He had bound himself so far, that these should be the terms introduced....There have been decrees, founded merely upon letters, proposals, never intended at the time to be a complete, final, agreement. It might as well be contended, that, if there was a reference to deeds to be formally executed, there is no agreement; but that is to be by the deed.

Upon the other point the Master of the Rolls declared his opinion upon the evidence, that the charge of misrepresentation was not made out.

The cause ended in a reference to the Master, to see whether a good title should be made.

[EDITOR'S NOTE. "An entry in a man's own diary, if signed by him, would do"; per A. L. Smith, L.J. (L.R. [1893] 1 Ch. 100).]

LAYTHOARP v. BRYANT.

COMMON PLEAS. 1836.

2 BINGHAM, NEW CASES, 735.

[Sale of Lands—Signature of one party only—Mutuality.]

THIS was an action against the defendant to recover damages for loss occasioned to the plaintiff by the defendant's refusing to pay for certain leasehold premises he had purchased at an auction, on the 3rd of December, 1833, for 441*l*.

The particulars and conditions of sale announced, that the lease and goodwill of the premises would be peremptorily sold by auction by Mr Thomas Ross, at the Auction Mart, by order of Mr W. Laythoarp, the proprietor, retiring from the trade.

The defendant signed a memorandum of the purchase at the back of a paper containing the particulars and conditions of sale, but being known to the auctioneer, was not required to pay any deposit. On the 12th of December the plaintiff's solicitor sent defendant an abstract of the plaintiff's title, and by letter called on him to proceed with the purchase, when the defendant, saying he had only bid at the plaintiff's request, refused to complete the purchase, and returned the abstract. An assignment of the lease, prepared by the solicitor of the ground land-

¹ [EDITOR'S NOTE. Cf. *Winn v. Bull*, *supra*, p. 41.]

lord, accompanied with a letter from the plaintiff's solicitor, was then sent to the defendant; this he also returned, still refusing to complete the contract, but making no objection to the title. The plaintiff thereupon sold the premises again, for 194*l.* 5*s.*, and brought this action to recover the difference between that sum and 44*l.*, the price which the defendant had agreed to pay.

A verdict having been found for the plaintiff, *Atcherley, Serjt.*, moved to set aside the verdict on the ground that the plaintiff's name was not in the contract, which appeared to be made with the auctioneer: that it was not binding on the plaintiff; that therefore, for want of mutuality, the contract was inoperative; and also as not being signed pursuant to the 4th section of the Statute of Frauds. He relied on *Lawrenson v. Butler* (1 Sch. & Lef. 13), where Lord Redesdale refused to enforce a specific performance, on the ground, that without a signature to bind the vendor there was no mutuality in the contract; and said, "otherwise it would follow that the Court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance. This is not equity as it seems to me."

* * * * *

A rule nisi having been granted:

Atcherley, in support of the rule.

In order to bind a purchaser of real estate, there must, under the 4th section of the Statute of Frauds, be a mutuality in the contract, as well as a consideration expressed in writing. Without those ingredients, there can be no agreement; and though the 17th section of the statute requires only a note of the bargain upon a sale of chattels, the 4th section, on a sale of real property, requires a note of the agreement. Here, upon the face of the particulars, the property appears to be sold by the auctioneer, not by the plaintiff; and the plaintiff, having omitted to sign, there is no agreement between him and the defendant. There is nothing to fix the plaintiff; nothing on which the defendant could have sued him for a breach of contract. The letters of the plaintiff's attorney accompanying the abstract and the assignment of the lease, are mere offers, and not an engagement to sell....But even in equity it is required that the writing the plaintiff seeks to enforce should import the privity and assent of both parties. And in *Champion v. Plummer* (1 N.R. 254), *Sir James Mansfield* said, "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? It is customary in the course of business to state the name of the purchaser, as well as of the seller, in every bill of parcels." Even independently of the statute, no agreement can be enforced without an actionable mutuality between the parties. In *Lees v. Whitcomb* (5 Bing. 34) it was held that a written agreement "to remain with A. B. two years for the purpose of learning a trade," was not binding for want of an engagement in the same instrument by A. B. to teach.

TINDAL, C.J. This case comes before the Court on two objections.

First, that when the contract is inspected it does not contain the name of one of the parties. I admit that an agreement is not perfect

unless in the body of it, or by necessary inference it contain the names of the two contracting parties, the subject-matter of the contract, the consideration, and the promise. Looking at this contract, as it may be collected from the particulars of sale, it appears to be an agreement by which Ross sells property on behalf of Laythoarp. When, in the outset, it says that the property will be sold, subject to conditions, we are referred to the conditions in the same paper; and there we see that Ross is an auctioneer who sells for Laythoarp. That gets rid of the objection, therefore, that Laythoarp's name is not contained in the contract.

The second objection is of great importance: that the contract has not been signed by the vendor. In order to determine the validity of the objection we must look to section 4 of the Statute of Frauds. That section directs that "no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person¹ thereunto by him lawfully authorised." And the object of the statute was, that no action should lie unless where it could be proved at the trial that the agreement had been signed "by the party to be charged."...

But then it is said, unless the plaintiff signs there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant's. The preamble runs, "For prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury." And the whole object of the legislature is answered when we put this construction on the statute. Here, when this party who has signed is the party to be charged, he cannot be subject to any fraud....Is it not every day's practice to put in a guaranty signed by the surety? but I never heard it objected that unless you shew also the signature of the other party the guaranty is void....

As to the decisions in courts of equity, I can only say that in the greater number of them there has not been a signature by both parties, and, notwithstanding the *dicta* of Lord Redesdale, courts of equity have continued the same stream of decision as before.

BOSANQUET, J....It is said there must be an agreement; and it must be signed. No doubt that is so². Is this an agreement? It states the particulars of the property to be sold; it incorporates the name of the

¹ [EDITOR'S NOTE. See *Grindell v. Bass*, where a counsel's signature to one of the "pleadings" in an action was held to make it a memorandum of the agreement sufficient to support an action against his client; 36 T.L.R. 867.]

² [EDITOR'S NOTE. Hence where, under the Statute of Frauds, a contract must be in writing, no clause in it can be varied or waived, after its making, except in writing. See *Hartley v. Hyman*s (36 T.L.R. 805).]

purchaser, the seller, the property and the price; it includes all the requisites of an agreement, and the defendant testifies by his signature that such an agreement exists. The question is, can the vendor enforce it, if it be not signed by himself?

The statute requires that it shall be signed by the party to be charged. It was not intended to impose on the vendor the burthen of the proof of some other paper in the hands of the opposite party, and which the vendor may have no means of producing; for it often happens that each party delivers to the other the part signed by himself. A common case is, where an agreement arises out of a correspondence; it often happens that a party is unable to give evidence of his own letter; and he is not [to] be defeated because he cannot produce a formal agreement signed by both the parties to the contract.

Rule discharged.

REUSS AND ANOTHER v. PICKSLEY AND ANOTHER.

EXCHEQUER CHAMBER. 1866.

L.R. 1 Ex. 342.

[*Statute of Frauds, s. 4—Signed proposal—Parol acceptance.*]

THE plaintiffs carried on business at Manchester, and the defendants carried on business as agricultural implement makers, at Leigh near Manchester. An industrial exhibition was to be held at Moscow in the autumn of 1864; and the defendants were desirous of exhibiting some of their machines there. They entered into negotiations with the plaintiffs, with the view of the plaintiffs undertaking to look after the goods sent by the defendants whilst at the exhibition. Upon the defendants proposing to make an agency for ten years with them if they would bear a part of the expense of the exhibition, one of the plaintiffs, Mr Ernst Reuss, stated that he would go to Moscow and superintend the arrangements necessary for exhibiting the defendants' goods. With that intention he went to Moscow in July, 1864, and remained there for a month. Meantime a quantity of goods were sent by the defendants to the plaintiffs for the purpose of being forwarded to the exhibition. On Mr Reuss's return he requested an interview with Mr Sims, one of the defendants, with reference to the Russian agency. An interview thereupon was had at which the terms of the agency were discussed, and afterwards the plaintiffs wrote to the defendants the following letter on Sept. 8th:

"Referring to our conversation with Mr Sims, respecting the machinery for the Moscow exhibition, it was arranged that we take charge of all the machines, &c., in Hull, and pay for your account all freight charges, insurances, &c., till delivered in Moscow. That we sell in Moscow as many of the machines as possible, and that after the close of the exhibition the unsold remainder be at your risk and expense, either to keep in Moscow or return home as you think fit at your expense. That we pay you here cash for all machines sold during the exhibition, the price to be calculated at list price less the full trade discount for cash. That you pay the travelling expenses there and back of Mr Smith, but that we pay his additional salary whilst in Moscow of 10s. per day, and his hotel bill. That the agency for Russia be for ten years from date on following conditions. You to allow us full discount for cash on all orders received by

us direct, and that you hand over to us to be dealt with in the same way all orders you receive from Russia (excepting those from Odessa). On all orders executed by you from Russia, excepting Odessa, that may come through any other agent in Great Britain, you allow us a commission of 5*l.* per cent. That we act as and are hereby appointed your sole agents for the kingdom of Italy on the same conditions as for Russia.

Ernst Reuss & Co."

To that letter the defendants replied as follows on Sept. 9th:

"Our Mr Sims desires me to acknowledge the receipt of your favour dated the 8th inst., and to say as far as the agency for Russia goes he considers it satisfactory, except that you must confine yourselves to us for every description of machinery we manufacture, and which you sell in Russia. With respect to Italy, Mr Sims cannot at present say anything about it, in consequence of the change which is likely to take place in our firm shortly.

p.p. Picksley, Sims, & Co., Joseph Smith."

The plaintiffs sent no reply to this letter, but after the date of it goods were sent to them by the defendants, and were forwarded by the plaintiffs to Moscow, where they were shewn at the exhibition. At the close of the exhibition a great proportion of the goods remained unsold, and in respect of these, as well as in respect of those sold, the plaintiffs incurred considerable expenses. In December, 1864, the defendants transferred their business to a Joint Stock Company, and in the February following, the plaintiffs' Moscow agent died. Shortly afterwards the plaintiffs and defendants entered into a correspondence with a view to a settlement, but were unable to come to any agreement. The plaintiffs thereupon brought this action. No orders for machinery from England had been received by either plaintiffs or defendants for Russia (except Odessa), at the time of the alleged breach.

Upon the trial *Pigott, B.*, directed the jury that the Moscow and Russian stipulations in the letters of the 8th and 9th September were parts of one and the same contract, and the jury found that the plaintiffs did accept and accede to the terms of that contract. A verdict was accordingly entered for the plaintiffs, damages 850*l.*....A rule nisi was obtained to set aside the verdict, on the ground of misdirection by the judge in ruling that the stipulations were one contract, and of the damages being excessive....The Court discharged this rule. The defendants appealed.

Brett, Q.C., for the defendants....The present case may be regarded in two ways: either the letter of the 9th may be regarded as an assent, with certain modifications, to the terms contained in the letter of the 8th, so as to constitute an entire contract; or else the two letters may be taken to constitute a proposal to which the plaintiffs assented by conduct without writing. As to the first alternative, the letter of the 9th was not an assent but a counter-proposal. The letter of the 8th in reality contained the terms of three separate contracts, as to the Russian agency, as to the Moscow exhibition, and as to the Italian agency. Then the reply is silent as to the Moscow exhibition, modifies the terms suggested as to the Russian agency, and declines the Italian agency altogether. The acceptance, therefore, as far as this reply goes, was neither unequivocal nor unconditional. As to the second alternative, if the contracts ought to be considered as three and not one, the plaintiffs' conduct

does not amount to an assent as far as the Russian agency is concerned. But granting that the two letters do contain a memorandum of a proposal signed by the party sought to be charged, that cannot be accepted by parol.... The principle of the sufficiency of a parol acceptance ought to be confined to a case where the writing assented to is in itself a memorandum of an agreement and not a mere offer. If it is the latter a subsequent acceptance without writing cannot be enough: it cannot turn a *proposal* into an agreement sufficient to satisfy the Statute of Frauds.... This distinction is recognised in the decisions on the Stamp Acts; a proposal accepted by parol requires no stamp, i.e., it is not considered a memorandum of agreement....

WILLES, J.... We are all of opinion that the judgment of the Court of Exchequer should be affirmed.... On the 8th September, 1864, one letter was written by the plaintiffs, and on the 9th an answer was sent by the defendants. The letter of the plaintiffs was to this effect. [The learned judge read so much of the letter as refers to the Moscow exhibition.] Then the letter proceeds to speak of the Russian agency in terms not applicable to a distinct or separate contract. Having dealt with the matters connected with the Moscow exhibition, which was to operate as accessory to the general agency and as an advertisement, the letter goes on to detail the terms of the agency for Russia; and as to this part of the arrangement the plaintiffs do not state that they are to abstain from taking orders from other persons. To this, and to this alone, the defendants objected in the letter of the 9th. Then follows, in the letter of the 8th, the paragraph respecting the Italian agency.

In answer to this letter comes the letter of the 9th September. So far, therefore, as the Russian agency goes, the letter of the 8th was otherwise satisfactory to the defendants. Now, the letter of the 8th dealt with the Russian agency and also with the arrangement respecting the Moscow exhibition. There was no reference to the one as distinct from the other, and the conclusion is, that as to the Moscow exhibition no observation was required, and as to the Russian agency the sole objection was that the plaintiffs, instead of having the agency given to them without limitation, were to be prevented from being agents for any one else. As to the Italian agency, that is put out of the question. The meaning, therefore, of the whole is this: "True we made a certain arrangement yesterday as to Russia, but we meant it to be with a limitation, and as to Italy we made no arrangement at all."

Now, this was either a memorandum of agreement, or at least a proposal with the terms of the letter of the 8th as a basis; a proposal, that is, that the plaintiffs should act as agents at Moscow, and become agents for Russia, pledging themselves to take no other agency. Therefore these letters constitute either an agreement or at least a proposal. Assume it in favour of the defendants to be the latter.

We must now consider what followed. The Moscow exhibition took place, and the goods intended for exhibition were forwarded and dealt with by the plaintiffs as they undertook to deal with them. Expenses were incurred by the plaintiffs which they certainly would not have incurred without a promise of the Russian agency; and these expenses were incurred with reference to the Moscow exhibition. Was this evidence

of assent on the part of the plaintiffs to the terms of the letter of the 9th September? The defendants maintain that it was not, and their argument depends on a dissection of the terms of the letter of the 8th. But we see no reason for dissevering those terms. The whole appears to have been one arrangement. When taking the two letters together we find the second silent as to the Moscow exhibition, and when we find moreover that the exhibition was accessory to and connected by way of advertisement with the rest of the Russian agency, we conclude that the whole transaction between the parties was one and indivisible. Therefore there was a performance of their part by the plaintiffs, which was evidence of an assent to the terms of the letters of the 8th and 9th September; or, treating the letter of the 9th as a modified proposal, there was evidence that the plaintiffs assented to it.

Now in point of law what was the effect of this assent? Putting for the moment the Statute of Frauds out of the question, no inquiry would be made as to the precise time at which the different parts of one single transaction took place. The question would be, was it or was it not one transaction, and was an assent contained in it; and in this case we are of opinion that the transaction was one, and did contain an assent. But the Statute of Frauds introduces a new element, because it makes it necessary by section 4 that an agreement not to be performed by either party within a year must be in writing, signed by the party to be charged therewith. Now all that was signed here was not a formal agreement but a proposal on one side, and there was an assent to that proposal on the other. All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th September, which must be taken to be recited in the letter of the 9th. The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent, without writing, to the proposal? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to, does become a memorandum or note of an agreement within the 4th section of the statute....It is quite a fallacy to suppose that because certain acts happen at different periods they cannot be so connected as to form one transaction. ✓

So far as to agreements; which must be mutual, but the statute only requires the signature of the party to be charged. But we may usefully consider...cases where a proposal is made, which may or may not be acted on. The most ordinary example is a guarantee, which by section 4 of the statute must be in writing. The creditor may supply goods to the person whose credit is guaranteed or not as he pleases, but if he does supply them the surety is bound except in cases like *Mozley v. Tinkler* (1 C.M. & R. 692), where on the true construction of the guarantee, it was held that notice of the plaintiffs' acceptance of it should have been given. But in that case it does not seem to have occurred to any of the Court that the acceptance need be in writing. That case therefore is confirmatory of our decision that the whole evidence of an agreement need not be in writing, but only all the terms along with the signature of the party to be charged.

It has been urged upon us that this conclusion will lead to fraud and perjury, the very mischiefs the statute was passed to prevent. We do not concur in that view; because no one will be able to enforce an agreement of the sort we are now discussing, without proving that he did or was ready to do his part to entitle him to performance on the part of the other contracting party. Moreover, if good for anything, that argument is good to shew that a regular *agreement* signed by one party only, ought not to bind him....

Suppose a lessee were to sign before the lessor. Every argument which has been urged to shew that a subsequent act cannot turn what is not an agreement into an agreement would apply; but could any one seriously contend that it would make any difference whether the lessor or lessee signed a lease first? The law is clear upon the point. We are not to look at the precise moment at which an assent is given, but at the entire transaction. And if the assent when given does make a contract, that is enough; for the proposal, though prior in time, is in fact a memorandum or note of the terms of that contract, signed by the party to be charged within the meaning of the statute.

Judgment affirmed.

WILLIAMS v. JORDAN.

CHANCERY DIVISION. 1877.

L.R. 6 CH. D. 517.

[Agreement for Lease—Offer and Acceptance—Lessor not named.]

ON February 29th, 1876, the defendants signed the following letter in the presence of a Mr Watson, who alleged himself to be the agent of the plaintiff, to sell or let the Bijou Theatre of which the plaintiff was the alleged owner:

"Sir,—I hereby agree to rent the Bijou Theatre, Bayswater...on a 7, 14, or 21 years' lease, to be computed from Lady Day next, and to contain the usual covenants, at an annual rent of £750, and to sign an ordinary lease. It is understood that I may be allowed to take formal possession of the said premises as soon as this offer is accepted, notwithstanding the lease may not be signed.

Witness:

Sydenham J. C. Watson.

*Robert Jordan,
Reuben J. Jordan,
Albert J. Davis."*

This letter was given to Watson for delivery to the plaintiff.

On the 5th of March, 1876, the defendants received the following letter:

"Messrs R. Jordan, R. J. Jordan, and Albert J. Davis.

Dear Sirs,

Re Bijou Theatre, &c.

Your offer of the 29th ult., to rent these premises upon lease of 7, 14, or 21 years, at £750 per annum, is accepted by the owner of the property, whose solicitor will shortly communicate with you regarding the lease....

Yours truly,
Sydenham Watson."

The defendants did not append their signatures to this letter nor to any other document referring to it.

The defendants subsequently refused to perform the contract, alleging that they had withdrawn their offer before the letter of the 5th of March, 1876, was written. The plaintiff brought his action for specific performance.

The defendants, by their defence, denied that the letters constituted a contract or agreement within the provisions of the Statute of Frauds. *Roxburgh, Q.C.*, for the plaintiff.

There is an offer to take a lease, signed by the parties to be charged, and an acceptance of that offer by the agent of the plaintiff by the description or reference of the owners. In *Potter v. Duffield*¹ (L.R. 18 Eq. 4) your Lordship observed: "The statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed" which is the case here².

JESSEL, M.R. I must most reluctantly allow the objection, but I think that I am bound to do so. The letter containing the offer was not addressed to anybody. It begins "Sir," but who "Sir" was does not appear from the letter. It is signed by the defendants, and that is all. There was a letter of acceptance sent to and received by the defendants, but that letter is not signed by the defendants, nor is it referred to in any subsequent letter or document bearing their signature. Now, as I understand the decisions on the Statute, there must be a memorandum in writing of some agreement. But the letter of the 29th of February is not an agreement; it is an offer by the defendants to somebody, I cannot tell who. The letter of acceptance does not shew who that somebody is, for there is nothing in it to incorporate it with the original offer, and no document referring to it of subsequent date with the defendants' signa-

¹ [EDITOR'S NOTE. "*A.B.'s* executor" is a sufficient description. But "the vendor" is not (1 Q.B.D. 720, 5 Ch. D. 665).]

² [MR FINCH'S NOTE. In the case of *Rossiter v. Miller*, 3 App. Cas. 1124, 1140 (A.D. 1878), in which one of the questions raised was whether the expression "the proprietors" was a sufficient description of one of the parties, Lord Cairns said, "I own I was somewhat surprised to hear that question argued. For I am sure your Lordships have frequently seen conditions of sale not merely by auction but by private contract, in which it is stated that the sale is made, sometimes by "the owners," and sometimes "by the mortgagees," and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendor's part is inserted. I never heard up to this time that a contract under those circumstances was invalid. In point of fact, the question is, is there that certainty which is described in the legal maxim *Id certum est quod certum reddi potest*? If I enter into a contract on behalf of "my client," on behalf of "my principal," on behalf of "my friend," on behalf of "those whom it may concern," in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the *Statute of Frauds*. But if I, being really an agent, enter into a contract to sell the house No. 1, *Portland Place*, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the *Statute of Frauds* can arise. I should be surprised if any authority could be found, and certainly none has been produced, to say that a contract under those circumstances would not be valid."]

ture. In the case of *Warner v. Willington* (3 Drew. 523), just as in this case, the lessor's name was not signed; and Vice-Chancellor Kindersley held that because the name of the lessor did not appear the memorandum was not sufficient to maintain an action for specific performance. He said: "But though this is the general rule, there is this exception, that if it can be ascertained who is the vendor or intended lessor from some other document which is sufficiently connected with the memorandum by clear reference" (of course he meant some other document previously existing) "that will cure the defect of the memorandum." There is, I have already said, no such document.

Judgment for defendants.

SHARDLOW v. COTTERELL.

COURT OF APPEAL. 1881.

L.R. 20 CH. DIV. 90.

[*Statute of Frauds—Agreement—Description of Property.*]

THIS was an appeal by the plaintiff from a decision of Mr Justice Kay (L.R. 18 Ch. D. 280).

[The plaintiff bought by auction a house at the Sun Inn, Pinxton, on the 29th of March, 1880, and paid his deposit, for which the auctioneer gave him a receipt in these terms: "Received of Mr A. Shardlow the sum of £21 as deposit on property purchased at £420 at Sun Inn, Pinxton, on the above date. Mr George Cotterell, Pinxton, owner." There were conditions of sale containing no description of the property, but headed "Property sale at Sun Inn, Pinxton, March 29th, 1880." At the bottom was the following memorandum, signed by the auctioneer: "The property duly sold to Mr Arthur Shardlow, butcher, Pinxton, and deposit paid at close of sale." Kay, J., held, that having regard to the word "purchased" in the receipt, there was sufficient connection between the two documents to allow them to be read together as saying what was sold, but he came to the conclusion that even taking them together there was not a sufficient description to satisfy the requirements of the Statute of Frauds.]

Whitehorne, Q.C., for defendant.

This is a patent ambiguity, and parol evidence is not admissible to explain it. The word "property" is of the vaguest description, and defines nothing. As in *Long v. Millar* (L.R. 4 C.P.D. 450), parol evidence is always admissible to shew to what property a description applies, but it cannot be called in to make a description where there is none. As regards the case of a devise, the Courts have always shewn more liberality to wills than to contracts.

[LUSH, L.J., referred to *Ridgway v. Wharton* (6 H.L.C. 257).]

That establishes only that, if a document is referred to, parol evidence is admissible to shew what document is referred to, and *Cave v. Hastings* so explains it¹. To make this case come within *Long v. Millar* there is required some description in the particulars of sale.

¹ 7 Q.B.D. 125.

[JESSEL, M.R. The memorandum is not in form a complete contract; no price is named. Does not *Long v. Millar* authorize us to join the several documents? Suppose a memorandum in this form: "I agree to buy for £450 the property which was put up for sale at the Sun Inn on the 29th day of March, 1880, by Mr Cotterell, and which was not then sold." Would not that be enough?]

In that case there would be a description. *Blagden v. Bradbear*¹ decides the point which arises here: it was held that the receipt could not be connected with the conditions of sale.

[BAGGALLAY, L.J., referred to *Bleakley v. Smith* (11 Sim. 150).]

Suppose the conditions and memorandum turned into a formal document, we should have nothing but "property" as a description, and how can that be held to satisfy the statute? it is a mere reference to a verbal agreement to sell. In *Monro v. Taylor* it was taken for granted that there must be some description². In *Price v. Griffith*³ the description was "coals, &c.," which is not nearly so vague as "property," but yet was held insufficient. In *Caddick v. Skidmore* a better description than we have here was held insufficient⁴. As regards the analogy of a devise, this is like a devise to A. B. of "all that property which I verbally promised yesterday to leave to him"; and that, we submit, would not be valid.

JESSEL, M.R. What makes a binding contract within the Statute of Frauds? In considering this it is well to go back to the statute, because the decisions sometimes gradually drift away (so to speak) from the statute, and if we rely on them alone we are likely to be misled. The Statute of Frauds, 29 Car. 2, c. 3, enacts by sect. 5 that all devises of land shall be in writing, and signed by the party devising the same, or by some other person in his presence and by his express directions. The 4th section provides that no action shall be brought upon any contract or sale of lands, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed as therein mentioned. There appears to me to be no distinction between these two sections as to the description required, and a decision as to what is a sufficient description in the one case must be an authority as to what shall be also sufficient in the other case. What is a sufficient description in writing? No one can say beforehand. You cannot have a description in writing which will shut out all controversy as to parcels, even with the help of a map. I have known a most bitter and long-continued litigation in a case where both sides had most beautiful maps, the contest being between two neighbouring proprietors as to the ownership of a ditch. No description can be framed that will prevent all dispute. The framers of the Statute of Frauds knew very well that they could not prevent perjury altogether, but considered that to require a note in writing was a useful check. It could not entirely prevent perjury, for parties may suborn witnesses to swear to the existence, contents and destruction of a memorandum which never in fact existed. Looking at the statute in that light, what is a sufficient description? "The estate of A.B. in the county of C.," or

¹ 12 Ves. 466.

² 8 Hare 51.

³ 1 D.M. & G. 80.

⁴ 2 De G. & J. 52.

"the estate of *A.B.* which he bought of *C.D.*," or "the estate of *A.B.* which was devised to him by *C.D.*," would be sufficiently specific. If so, why should not "the property which *A.B.* bought of *C.D.* on the 29th of March, 1880," be sufficient? Would anybody doubt that in a will "the property which I bought of *C.D.* on the 29th of March, 1880," would be a sufficient description? If it is so in a will why not in a contract?

Let us look at the words in the present case. There are three specific terms; that on a given day it was sold at a given place, and that it belonged to Mr George Cotterell. It appears to me that this is an amply sufficient description. True there may be a dispute about what the property was, but so there always may be. It is admitted that the word "house" would have been sufficient, but that term would no more have excluded a dispute than the word "property." I am of opinion, therefore, that the receipt alone contains enough to determine what the thing sold was. When we come to look at the conditions of sale we find a good deal more. [His Lordship then made observations to the effect that the conditions, though not expressly shewing that the subject of the sale was real estate, contained indications that it was.] Then we have at the foot the memorandum, "The property duly sold to Mr A. Shardlow, butcher, and deposit paid at close of sale." It therefore appears to me there is sufficient description of the property.

BAGGALLAY, L.J. I also agree in thinking that the receipt was a sufficient memorandum to satisfy the requirements of the Statute of Frauds. If we look at that document we find the name of the vendor, the name of the purchaser, the price, and the signature of an agent who signed on behalf of the vendor, but it is argued that it is too indefinite as regards the description of the property, which is merely described as "property purchased at £420 at Sun Inn, Pinxton, on the above date." In *Ogilvie v. Foljambe* (3 Mer. 53) the description of "Mr Ogilvie's house" was held to be sufficient, and in *Bleakley v. Smith* (11 Sim. 150) it was held that the "property in Cable Street" was a sufficient description. I see no difficulty in applying that doctrine here, and in my opinion the receipt alone contains a sufficient description. But, the receipt and the conditions with the memorandum at their foot may be read together (as the learned Judge in the Court below held), and so reading them we have evidence that there was a sale by auction under conditions of sale which indicate that what was sold was real property, and I think that the two documents together are more than sufficient to furnish a description. I do not assent to the proposition that letters only can be read together. I take it that any documents, whether letters or not, one of which refers to the other, can be read together, and the authority of *Long v. Millar* (L.R. 4 C.P.D. 450) was hardly required in support of that proposition.

LUSH, L.J....The argument is that the word "property" is a term used for all kinds of chattel property as well as real estate, and that here we cannot tell whether it be one or the other. But on the face of the documents it is clear that it is property that can only pass by conveyance; because the expenses of the transfer are to be paid by the purchaser. There is no transfer if you buy a horse or anything of that

kind. Then the day is fixed on which possession is to be given up, and this points to the sale of real property. I therefore come to the conclusion that a reasonable interpretation of the word "property" in these documents is "real property." If this is so, we have the nature of the property, the name of the seller, the name of the buyer, the price to be paid, and the time when the purchase is to be completed, but it is urged that the property is not described with sufficient certainty.... Suppose a landowner were to write to another, "I will sell you all my property in Regent Street for £10,000," and the other writes to accept the offer, could it be argued that this was a void contract because the number of the houses was not specified?...

Judgment for plaintiff.

HOADLY v. M'LAINÉ.

COMMON PLEAS. 1834.

10 BINGHAM, 482.

[*Sufficiency of memorandum—Price not stated.*]

THIS was an action against the defendant, for not accepting a landaulet made to his order by the plaintiff.

The order, which was in writing, and delivered to the plaintiff on the 15th of May, 1832, was as follows: "Sir Archibald M'Laine orders Mr Hoadly to build a new, fashionable, and handsome landaulet, with the following appointments" [here followed a minute detail of various small matters, to which the proprietors of such vehicles attach importance]; "the whole to be ready by the 1st of March, 1833." The carriage was completed by the time agreed on; but, in the course of its construction, a great number of alterations and additions were made from time to time at the request of the defendant.

In April, 1833, the defendant wrote to the plaintiff, desiring that he would send his bill for the carriage, and announcing the defendant's intention to have it out immediately. The bill, however, amounting to 480*l.*, the defendant refused to pay it, or to accept the carriage. Whereupon the plaintiff brought the present action. A great number of coachmakers having proved that the landaulet was of such exquisite workmanship, and so highly ornamented, as to be cheap at the price demanded, the jury gave a verdict for the plaintiff, with 200*l.* damages.

Jones, Serjt., obtained a rule nisi to set aside this verdict. First: the order of May 15, 1832, being silent as to price, there was no sufficient note or memorandum of the contract under the seventeenth section of the Statute of Frauds, and the 9 G. c. 14¹. In *Elmore v. Kingscote*

¹ [EDITOR'S NOTE. By which latter statute, after reciting that seventeenth section, it was enacted, "That the said enactments shall extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." This provision is re-enacted in the same words by s. 4 (2) of the Sale of Goods Act, 1893.]

(5 B. & C. 583), the Court said, "there must be a note or memorandum in writing of the bargain. The price agreed to be paid constitutes a material part of the bargain. If it were competent to a party to prove, by parol evidence, the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent." Secondly: considering the alterations and additions which had been agreed to while the vehicle was in the course of construction, the contract proved did not coincide with the contract of the 15th of May, 1832, which was the only one set out in the declaration.

TINDAL, C.J....It is clear that a contract for the sale of a commodity, in which the price is left uncertain, is, in law, a contract for what the goods shall be found to be reasonably worth. This is no new doctrine; for in *Blackstone's Commentaries*, b. 2, c. 20, it is laid down, that "if I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value."

What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth. It has been contended that this would open a door for perjury, and let in the mischief which the Statute of Frauds proposes to exclude. But I cannot agree in that proposition; for it does not appear that any specific price was agreed on. If it had appeared that such was the case, this note would not have been evidence of such a bargain, as *Elmore v. Kingscote* expressly decides.

Thus the law stands on the note or memorandum of May, 1832. But we may look at all the writings to see what the contract was; and here, from the defendant's letter of April, 1833, it appears that, after he had seen the carriage, he desired the plaintiff to send in his bill. He must have known whether he had contracted for a stipulated price or not; and it may therefore be inferred, from this letter, that he knew he was to pay the reasonable charge when the article was made up.

PARK, J....It is only necessary that price should be mentioned in the memorandum, when price is one of the ingredients of the bargain: the dicta in *Elmore v. Kingscote* are applied to the facts of that case, in which the bargain was for a specific price; and it is admitted on all hands that, if a specific price be agreed on, and that price is omitted in the memorandum, the memorandum is insufficient....The defendant's letter, referring to the article which was the subject of the contract, says, "Send me my bill. I shall bring out the carriage immediately." Putting the two writings together, it is impossible to say he did not undertake to pay on a *quantum meruit*.

GASELEE, J....Unless we establish as a general principle that every alteration introduced in the progress of an executory contract is to constitute a distinct bargain, requiring a distinct note in writing, I am of opinion that there is no variance in this case, and that there has been a sufficient memorandum of the contract. If we were to hold otherwise, every building contract would be avoided by every addition. With respect to price, the parties could not put down what was not settled; and as the memorandum contains all the terms of the bargain as far as

the parties had agreed on it at the time, I am of opinion it is sufficient to bind the defendant.

* * * * *

Rule discharged.

OLIVER v. HUNTING.

CHANCERY DIVISION. 1890.

L.R. 44 Ch. D. 205.

*[Sufficient Memorandum—Independent Documents—
Parol Evidence to Connect.]*

IN August, 1888, Emma Oliver, a married woman, possessed of considerable separate estate, negotiated with a Mr Hunting for the purchase of a freehold property known as the Fletton Manor House estate. Eventually she agreed to purchase it for £2375; and on the 7th of September, 1888, he signed the following document:

“Memorandum of terms of agreement between Mr Hunting and Mrs Oliver: Price, £2375; vendor to make good title; purchaser to pay for her own conveyance; fixtures included in purchase; purchase to be settled as soon as possible; possession on 25th September; deposit to be paid on the 10th.” On September 12th, 1888, Mr Hunting wrote and sent a letter to Mrs Oliver in the following words: “I beg to acknowledge receipt of cheque value £375 on account of the purchase-money for the Fletton Manor House estate.”

Mr Hunting having refused to complete, Mrs Oliver commenced this action against him, claiming specific performance of the contract of the 7th of September; and alleging in her statement of claim that in pursuance of the said contract she, on September 10th, paid to Mr Hunting the sum of £375 as a deposit and in part payment of the said purchase-money. Mr Hunting, by his statement of defence, did not admit any of the allegations in the statement of claim, and relied on the Statute of Frauds.

Issue was joined. This was the trial of the action.

Mrs Oliver in her evidence deposed that she sent the cheque of £375 on account of the purchase-money of the Fletton Manor House estate. It was part of the £2375. No other money was payable by her to the defendant, because the £2000 was to be paid over to a mortgagee of the property.

Warmington, Q.C., for defendant:

The memorandum must contain all the terms of the agreement; and, if the agreement is contained in more than one document, then there must be a connection between all on the face of them. Parol evidence is admissible to explain an ambiguity, but the cases do not go further. You cannot have parol evidence to connect two documents which on the face of them have no reference to or connection with each other: *Warner v. Willington* (3 Drew. 523); *Boydell v. Drummond* (11 East 142); *North Staffordshire Railway Company v. Peek* (E. B. & E. 1001). Here there is no ambiguity.

KEKEWICH, J. The memorandum to be signed by the party sought to be charged, so as to bring a particular case within the Statute of Frauds, need not be on one piece of paper; nor need it be a complete document, signed by the party at one and the same time. It may be contained in two or more pieces of paper. But they must be so connected that you can read them together, so as to form one memorandum of the contract between the parties. Directly you get beyond that, you get into difficulty. One can illustrate that in a simple manner. An intending purchaser accepts an offer made by a proposing vendor thus: "In reply to your letter of the 14th instant." Can one annex to that reply the letter of the 14th instant? Surely one cannot, without inquiring what letter it is; unless the purchaser has, with unusual prudence, completed the reference by saying, "In reply to your letter of the 14th instant, a copy of which is on the other side." In the absence of any such complete evidence as that, one must inquire what the letter of the 14th instant was, because it may have been a reference to any one of half a dozen different letters. The old rule was...(as stated in *Blackburn on Sale*) that: "If the contents of the signed paper themselves make reference to the others so as to shew by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing" (as in the case which I have mentioned of a letter referring to a previous letter, of which the copy is annexed). "But if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shewn by circumstances not apparent on the face of the writings, the memorandum is not all in writing; for it consists partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing." But certainly of late a different rule has been introduced; and it is a rule consistent with the convenience of mankind, because if you were to exclude parol evidence to explain such a doubtful reference as "the letter of the 14th instant," the result might in a large number of cases be gross injustice. I take it to be quite settled that in a case of that kind you may give parol evidence to shew what the document referred to was. I take it that you may go further than that; and that if you find a reference to something which may be a conversation, or may be a written document, you may give evidence to shew whether it was a conversation or a written document. And, having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved. So far there is no difficulty. That was applied in the case of *Ridgway v. Wharton* (6 H.L.C. 238); where the question was on the meaning of instructions which did not by any means necessarily point to a written document; but later the cases have gone further than that, and it seems to me that *Long v. Millar* (4 C.P.D. 450) does establish a very much larger series of exceptions. In *Long v. Millar*, Bramwell, L.J., gives an illustration which seems to me to go to the root of the matter. It is this: "Suppose that A writes to B saying that he will give £1000 for B's estate, and at the same time states the terms in detail, and suppose that B simply writes back in return, 'I accept your offer.' In that case

there may be an identification of the documents by parol evidence, and it may be shewn that the offer alluded to by *B* is that made by *A*, without infringing the Statute of Frauds, which requires a note or memorandum in writing." If that is sound, it is difficult, perhaps, to say where parol evidence is to stop; but substantially it never stops short of this—that wherever parol evidence is required to connect two written documents together, then the parol evidence is admissible¹. Perhaps the real principle upon which that is based is, that you are always entitled in regarding the construction and meaning of a written document, to inquire into the circumstances under which it was written; not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances with reference to what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted.

I find a letter of the 12th of September, 1888, written by the defendant to Mrs Oliver; and in that he says: "I beg to acknowledge receipt of cheque, value £375, on account of the purchase-money for the Fletton Manor House estate, for which I thank you." I have here, perfectly clear, that there is a property called Fletton Manor House estate, which constitutes the subject of a purchase, and, therefore, the subject of a sale. I have also that £375 is part of the purchase-money for that house. But, beyond that, I have no terms of a contract. I am entitled to consider the circumstances under which the letter was written, in order to give any meaning that I properly can to it—not to add terms to it, but to find out what the meaning necessarily must be, having regard to the facts and circumstances. And, having got the evidence which I have in this case, the conclusion is inevitable that it refers to a previous memorandum of terms of agreement under which Mrs Oliver becomes the purchaser of this particular property for the price of £2375, on account of which the cheque for £375 was sent. Having got the connection between the two documents, I have then enough to enable me to read the two documents together. Reading them together, I have a distinct memorandum of contract, specifying all the terms; the second one supplying what the first one omitted to give, namely, singularly enough, the property which was intended to be purchased and sold. That being so, the objection that there is no memorandum within the Statute of Frauds fails....

Judgment for plaintiff.

¹ [EDITOR'S NOTE. In *Pearce v. Gardner* (L.R. [1907] 1 Q.B. 688) the Court of Appeal thus held that a letter not mentioning the name of the purchaser could be supplemented by the address on the envelope in which the letter had been posted to him, and parol evidence was admitted to identify the envelope and so connect it with the letter.]

BIRKMYR v. DARNELL.

KING'S BENCH. 1704.

1 SALKELD 27.

[Guarantee—Collateral Undertaking.]

Declaration, That, in consideration the plaintiff would deliver his gelding to A, the defendant promised that A should re-deliver him safe. Evidence was, that the defendant undertook that A should re-deliver him safe. This was held a collateral undertaking for another. For where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements. But where the whole credit is given to the undertaker, so that the other party is but as his servant; and there is no remedy against him, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment, against the original hirer, as well as an assumpsit upon the promise against this defendant. This was upon a case stated at the trial for the opinion of the Court; judgment was given for the defendant.

Et per Cur. If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, *If he does not pay you, I will*; this is a collateral undertaking, and void without writing, by the Statute of Frauds. But if he says, *Let him have the goods, I will be your paymaster, or I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.

MOUNTSTEPHEN v. LAKEMAN.

EXCHEQUER CHAMBER. 1871.

L.R. 7 Q.B. 196.

[Promise to answer for debt of another—Evidence of promise to be primarily liable.]

FIRST count: That defendant was chairman of the local board of health of Brixham, and in consideration that plaintiff would do certain work for the board at request of defendant, as and assuming to be agent of the board, defendant promised plaintiff that he was authorized by the board to make such request; that plaintiff did the work accordingly, but defendant turned out not to be authorized, and plaintiff was unable to make the board pay.

Second count: Alleging defendant's promise to be that he would procure a contract from the board, whereby they should be bound to pay for the work.

Money counts: For work and labour, &c.

Count, added at the trial, alleging defendant's promise to be that, in consideration that plaintiff would do the work for the board, defendant promised to pay for the work, if the board should at any time refuse to pay.

Pleas to the money counts, never indebted; and to the other counts, (a) That defendant did not promise as alleged, (b) That plaintiff did not do the work at defendant's request as alleged.

The defendant was chairman of the Brixham local board of health. The plaintiff was employed, in 1866, by the board to construct certain main sewage works in the town. On March 19th, 1866, notice was given by the board under the Public Health Act, 1848, s. 69, to the owners of certain houses to connect their house-drains with the main sewer within twenty-one days. Before the expiration of the twenty-one days, Adams, the surveyor of the board, proposed to the plaintiff that he should construct the connections between the drains and the sewer. The plaintiff said that he was willing to do the work if the board would see him paid. On April 5th, that is, before the expiration of the twenty-one days, the construction of the connections was commenced by the plaintiff.

The plaintiff stated in evidence that before the construction of the connections was commenced, he...had an interview with the defendant, at which the defendant said, "What objection have you to making the connections?" Plaintiff said, "I have none; if you or the board will order the work or become responsible for the payment." The defendant replied, "Go on, Mountstephen, and do the work, and I will see you paid."

The plaintiff completed the connections under the general superintendence of the surveyor of the board; and the plaintiff, on December 5th, 1866, sent an account to the board debiting them with the amount. The board disclaimed responsibility on the ground that they had never entered into any agreement with the plaintiff; nor authorized any officer of the board to agree with him for the performance of the work in question. The plaintiff, for the first time, in November, 1869, applied to the defendant for payment of the work; and the defendant having refused to pay him, commenced this action.

At the close of the plaintiff's case, the counsel for the defendant claimed a nonsuit on the ground that there was no evidence of any liability on the part of the defendant. The learned judge declined to nonsuit, stating his opinion there was evidence to support a new count in the form above given, which he gave the plaintiff leave to add.

The defendant's case was then entered upon, and the defendant denied that any conversation of the kind deposed to by the plaintiff had ever taken place. The Chief Baron left it to the jury to say whether the conversation did take place; and the jury returned a verdict for the plaintiff.

Leave was reserved to the defendant to move to enter a nonsuit, if it should appear that there was no evidence (either upon the original declaration or upon the declaration as amended) which ought to have been left to the jury.

The Court of Queen's Bench afterwards (L.R. 5 Q.B. 613) made the rule absolute to enter a nonsuit, on the ground that the defendant's engagement did not amount to an undertaking to be primarily liable for the work; but only to a promise, that if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another within s. 4 of the Statute of Frauds, and not being in writing was void. [The plaintiff appealed.]

H. T. Cole, Q.C., for defendant. The contract to be deduced from the conversation, coupled with the position of all parties at the time, is, that the owners or occupiers of the houses were the parties to be primarily liable, and the promise of the defendant, "I will see you paid," amounted to no more than a guarantee; *Keate v. Temple* (1 B. & P. 158). Why should the defendant make himself primarily liable? The conversation could only import what the judges in the court below said it did. [He cited *Peckham v. Faria* (3 Doug. 13). The plaintiff's original claim for payment was not made to defendant but to the board.]

[WILLES, J. Suppose this to be put down in writing, but not signed by *C*: "A having ordered a house to be built by *B*, *B* is desirous of having the security of some third person, and *C* is willing to become surety for *A*, and requests *B* to go on with the house accordingly." *B* builds the house; but it turns out, when the house is built, that the order supposed by *B* and *C* to have been given by *A* was not by *A* but by *X*, who had no authority from *A*, and, consequently, there was no liability of *A*. The contract would be void, independently of the Statute of Frauds, because *C* never meant to become liable unless *A* was primarily liable; both parties being mistaken, there is no contract at all.]

In the present case there was no such common error; both parties knew that neither the owners nor the local board had given any orders at the time the conversation between the plaintiff and defendant took place.

WILLES, J. [after going minutely through the facts of the case]. At the time the conversation took place, it was known, both to the plaintiff and the defendant, that the house-owners were not liable, and had not interfered in the matter. The plaintiff did not doubt the board's ability to pay, and he wanted no guarantee for this work any more than for the work which he had already done for the board. But he knew he had not got the order of the board, and so did the defendant (although the contrary seems to have been assumed by the Court of Queen's Bench). Therefore the meaning of the conversation could not be that the defendant would guarantee payment by the board. But it might mean that he had, or would obtain, the order of the board, in which case the principle of *Collen v. Wright* (*infra*, ch. IX) would apply, and the defendant might be liable on the first or second count. But it was competent to a jury to find—and I need go no further than that (though I think it would have been the proper conclusion to draw)—that the meaning of the answer of the defendant was not "I will be liable as surety for the board, if they become liable to you," making the contract one of suretyship; but "Whether the board be liable or not, do the work and you shall be paid"; that is, "I undertake to pay you for the work, unless you should happen to be paid either by the board or by the owners, assuming they come forward and pay, though they are not liable." That appears to me to be the result of the conversation. It is a bargain, therefore, by the defendant to pay for the work, though it was known that there was no person liable at the time, and whether a third person should become liable in future or not, that is, whether or not there was, or might be, a third person who could be liable for "debt," or guilty of a "default or

miscarriage" in the matter. And it is only in respect of such a third person that the Statute of Frauds applies.

The leading case upon the application of the Statute of Frauds has generally been considered to be *Birkmyr v. Darnell* (*supra*, p. 102). In the note to Mr Evans's edition of Salkeld it is stated, that, "from all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods are furnished is liable at all, any other person's promise is void, except in writing." I think that may very well be modified: "Or if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the promise is void": so as to include the case (which I put to Mr Charles) of persons wrongly supposing that a third person was liable, and entering into a contract on that supposition. If, in such a case, it turned out that a third person was not liable at all, the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The *lex contractus* itself would make an end of the claim (and not the application of the Statute of Frauds) whether the contract was in writing or not, and whether signed or not. Take away the foundation of principal contract, the contract of suretyship would fail. Again, if there was a contract with reference to a liability, not existing at the time (by reason of the debt not being due at the time) but being payable in futuro, that would come under the word "default," and there would be no difficulty about that. So, if there was a contract, "If A.B. will employ you to do work, I promise to become surety for him that he shall pay you"; in that case the promise would clearly come within the statute, because, although there was no liability existing at the time when the promise was made, there was a liability contemplated as the foundation for the promise of the defendant. It was a contract of suretyship in respect of a liability to be created; but if the liability were not created, there again the *lex contractus* would prevail. There would be the condition precedent to the arising of any liability as surety, that there should be a principal debtor established. In all these cases you have the case of principal debt contemplated by the parties; and suretyship founded in respect of that principal debt. But to bring the case within that rule, you must shew that the parties did intend that there should be a principal debtor. In this case, seeing that the parties knew that the board was not liable, and that the plaintiff would not go on unless he had the board or the defendant liable, and did not care to have the defendant liable if the board was liable, the facts seem to exclude (and the jury might well find that they excluded) the notion of the defendant becoming surety for a liability, either past, present, or future, upon the part of the board. They might look upon the defendant's contract as a contract to pay, whether the board has been, is, or shall be liable or not: "Do that work now, and you shall be paid for that work." So that it is a case of principal liability.

Mr Cole suggested that the true result ought to be a new trial; but the question for the opinion of the Court of Appeal is stated to be, whether or not the defendant is entitled to have a nonsuit entered.

I do not think it necessary to make any further remarks upon the

judgment of the Court below....I conceive that it assumes the fact differently from what it appears upon the case as laid before us. It assumes that the plaintiff thought he had the order of the board; whereas it appears upon the case that the plaintiff would not go on because he thought he had *not* got the order of the board. The result appears to be, that the jury might well, upon the evidence, have found an original liability in the defendant, a liability not falling within the provision of the Statute of Frauds. A nonsuit, therefore, could not have been sustained.

* * * * *

Judgment reversed.

[The decision was affirmed by the House of Lords (L.R. 7 H.L. 17). Lord O'Hagan said: "Our judgment proceeds merely upon the ground that there was evidence to go to the jury." Lord Cairns, L.C., said: Lakeman did that which the contractor required to be done; he put the contractor into the position of having then and there an absolute contract made. The only contract which then and there could be absolutely made would be a personal and primary contract by him to pay the contractor for the work to be done."

Lord Selborne said: "There can be no suretyship unless there is a principal debtor; who of course may be constituted by matters *ex post facto*, and need not be so at the time. But until there is a principal debtor there can be no suretyship."]

FENTON v. EMBLERS, EXECUTOR OF MAY.

KING'S BENCH. 1762.

3 BURROW, 1278.

[*Statute of Frauds, s. 4—Agreement not to be performed within one year.*]

THIS was a special case, reserved at nisi prius, in an action against Emblers, as representative of one May deceased.

The only doubt was upon the fifth count: which fifth count was, "That the said William May, in consideration that the said Sarah (the plaintiff) would be and become the house-keeper and servant of the said William, and take upon herself the care and management of his family, &c.; and perform the same as long as it should please the said William and Sarah; undertook and promised to pay wages to the said Sarah at and after the rate of six pounds for one year; and ALSO BY HIS LAST WILL AND TESTAMENT to give and bequeath to the said Sarah a legacy or annuity of 16*l.* by the year, to be paid and payable to her yearly and every year from the day of the decease of the said William for and during the term of her natural life; and that she the said Sarah, confiding in the said promise, entered into his service, and became his house-keeper, &c., and continued so for three years and fifty-nine days: but that he the said William had not performed his said agreement, and did not leave her such legacy or annuity, &c."

It was stated in the case that it appeared upon the evidence, that there was such an agreement between the said William May and the

plaintiff; but that it was by parol, and not in writing; that the plaintiff, in performance of her part of the said agreement, did enter into the testator's service, as housekeeper, &c.; and continued in such service till the testator's decease; that the testator did not give her by last will, or otherwise, the said annuity of 16*l.* per annum, or any other annuity.

A verdict was found for the plaintiff on the fifth count, for 220*l.* subject to the opinion of the court; first, whether the evidence was sufficient to maintain the action upon it; secondly, whether the agreement therein set forth ought not to have been in writing.

Hall, for the defendant, objected—first, that this evidence is not sufficient to prove the special agreement laid in the fifth count; which ought to be proved precisely. He said, there was a material variance between the case laid in the declaration, and the case proved. For the case laid in this fifth count in the declaration is not a hiring for a year; because either party was at liberty to put an end to the contract: but the case proved is a general hiring; which, in construction of law, is a hiring for a year.

Secondly, that by the Statute of Frauds, this agreement, as it was not to be performed within a year, ought to have been reduced into writing.

This is a promise of a legacy, by an instrument revocable at pleasure. This is a method of binding the assets, without making a will....It would be extremely inconvenient to establish promises of this kind, not reduced into writing. The present agreement could not be performed, on May's part, within a year. For a whole year from his death was to elapse, before the annuity or any part of it would become payable....

LORD MANSFIELD. There is nothing in the objection about his leaving it by his will: for there is nothing testamentary in a promise "to leave at his death."...

MR JUSTICE DENISON. The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only *may* be performed within the year; and the Act can not be extended further than the words of it. *Peter v. Compton* (Skinner, 353) proves the distinction of a contingency as fully and clearly as possible. It was an action upon agreement, in which the defendant promised, for one guinea, "To give the plaintiff so many at the day of his marriage." The question was, "If such agreement ought to be in writing"; for the marriage did not happen within a year. The Chief Justice (HOLT, before whom it was tried) advised with all the judges. By the greater opinion (for there was diversity of opinion, and his own was *à contra*): "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year; there a note in writing is not necessary; for, the contingent might happen within the year. But where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary; otherwise, not."

MR JUSTICE WILMOT concurred; and agreed with the reason of a case in Salk. 280, "That by possibility, the ship might have returned within the year; though by accident it happened that it did not: and the clause in the statute only extends to promises where, by the express appointment of the party, the thing is not to be performed within a year."

Judgment for plaintiff.

CHERRY v. HEMING AND NEEDHAM.

EXCHEQUER. 1849.

4 EXCHEQUER, 631.

[*Statute of Frauds—Signature—Agreement under Seal.*]

THIS was an action of covenant on an indenture, dated the 31st of March, 1836, whereby the plaintiff assigned certain letters patent to the defendants, who covenanted to pay the plaintiff 840*l.*, by instalments extending over several years, subject to a proviso, that if, at the expiration of twelve months from the date of the indenture, the defendants should not approve of the working of the patent, and should give notice of their disapprobation, and of their intention to sell the patent, then the payment of the first instalment should be suspended; and if, having given such notice, the defendants should within six months sell the patent, then the covenant should cease and determine. The defendants pleaded non est factum.

At the trial, before Platt, B., it appeared that the defendant Needham had executed the deed, and there was the signature to it of all the parties, except that of the defendant Heming. There was, however, a seal at the foot of the deed for each party, being the seal ordinarily used in the office of the plaintiff's attorney, who prepared the deed and who had attested the execution of the defendant Needham. The deed was produced out of the custody of Heming. The defendants had endeavoured to work the patent, but, being dissatisfied with it, sent, on March 31st, 1836, notice in the handwriting of the defendant Heming, and signed by both the defendants [of their disapprobation of the patent, and of their intention to sell it, in the terms of the proviso].

It was objected that there was no evidence of the execution of the deed by the defendant Heming; but the learned Judge ruled that there was evidence for the jury¹. It was also objected, that this was a contract within the 4th section of the Statute of Frauds, 29 Car. 2, c. 2, and ought, therefore, to have been signed by the defendant Heming. His Lordship was of opinion that a deed was not within the meaning of that statute, and a verdict was found for the plaintiff.

Upon a rule nisi for a new trial, on the ground of misdirection.

Knowles, in support of the rule. Deeds are within the mischief which it was the object of the statute to prevent. [*Parke, B.* The object was to render the evidence certain. In *Aveline v. Whisson* (4 M. & G. 801), an action of covenant on a lease, a plea that the indenture was not signed

¹ [On the appeal, the Court of Exchequer similarly held that there was clearly evidence to go to the jury. *Parke, B.*, referred to *Hudson v. Revett* (5 Bing. 368), as to presuming delivery of deeds.]

by the lessor. or any agent authorized in writing, was held bad. That shews that the first section of the statute does not apply to deeds.] An agreement is not the less an agreement because it is under seal. [*Alderson, B.* Your argument must go this length: that a deed sealed and attested, but not signed, is no agreement under the Statute of Frauds.]

The cases in which it is held that the statute does not apply to agreements, one part of which is to be performed within a year, and the other not, are opposed to the older authorities, and that the word "agreement" has been frequently construed to mean all that is to be done *on both sides*. An agreement includes both the consideration and promise. Expanding the language of the statute, it means any arrangement between the parties where that which is the consideration for the other party's acting is not to be performed within the year. Performance is not complete until both parties have performed their promises.

* * * * *

PARKE, B. With respect to the question, whether this is an [agreement] within the Statute of Frauds, *Donellan v. Read* (3 B. & Ad. 889) is an answer. The question turns upon the construction of the words "not to be performed"; and in *Donellan v. Read* the Court considered that those words meant, not to be performed *on either side*, and did not include cases where the contract was performed on the one side....

I think a deed is not within the Statute of Frauds; because, in my opinion, that statute was never meant to apply to the most solemn instrument which the law recognises.

I also think that the notice of March 31st, which refers to the deed, would, if it were necessary to have recourse to it, be a sufficient note or memorandum within the statute.

ROLFE, B. I am strongly inclined to think that the statute does not extend to deeds; because its requirements would be satisfied by the parties putting their mark to the writing. The object of the statute was to prevent matters of importance from resting on the frail testimony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means, that such instruments are not to rest on parol testimony only; and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark.

* * * * *

Rule discharged.

[EDITOR'S NOTE. General opinion confirms the view that the Statute does not apply to deeds. So in U.S.A.; *Parsons' Contracts* i. 113. Blackstone, however, thought otherwise (ii. 306); and see *Chitty on Contracts*, 16th ed. p. 93.

But the view of Parke, B., as to the exception established in *Donellan v. Read* was challenged in *Reeve v. Jennings* (L.R. [1910] 2 K.B. 522). The judges there held that the fact, that the contract *can* legally be performed on one side within the year, is not enough to take it out of the Statute and admit parol evidence, unless the

parties expected that it would *actually* be so performed. Hence they held writing necessary where a servant, upon a weekly hiring, agreed that on the termination of his service he would not within the next thirty-six months set up in the same trade as his employer's, within a certain area. The hiring could be terminated by a week's notice at any time; and so might be ended within the year. But obviously the parties contemplated its continuing much longer.

This decision was unfortunately not cited in the later case of *Hanan v. Erlich* (104 L.T. 494), where A. T. Lawrence, J., said, "It is not a question as to what the parties probably contemplated; but as to what the language of the agreement requires." He adhered to the simpler rule of Parke, B., saying, "Where the obligation of the one party can be performed within the year, the case is not within the statute." But it is well settled that if *neither* part can normally be performed within the year, a power to determine the contract earlier, by notice, does not take it out of the statute. Exercising a power to terminate is not "performing."]

BRITAIN v. ROSSITER.

COURT OF APPEAL. 1879.

L.R. 11 Q.B.D. 123.

[*Statute of Frauds, s. 4—Contract not to be performed within a year—
Part performance.*]

ACTION for wrongful dismissal. The plaintiff entered into the defendant's service as clerk and accountant for one year.

The plaintiff and the defendant had interviews upon the 17th, 19th, and 21st of April, 1877. The 21st was a Saturday, and the plaintiff entered upon the defendant's service upon Monday the 23rd. The final arrangement between the parties was arrived at upon the Saturday. The plaintiff remained some months in the defendant's service and was then dismissed without a three months' notice. The defendant relied upon the Statute of Frauds, s. 4. At the trial before Hawkins, J., the verdict was entered for the defendant upon two grounds: first, that the contract was made finally upon Saturday, the 21st of April, and being made upon that day was within the Statute of Frauds, s. 4; secondly, that there was no evidence of a new contract on Monday, April 23rd, it not being proved that the contract made on the previous Saturday was altered or rescinded.

The Exchequer Division having refused a new trial on the ground of misdirection,

Firth moved by way of appeal. The contract of service for one year was to begin from Monday, the 23rd of April, and therefore was a contract to be performed within a year; *Cawthorne v. Cordrey* (13 C.B., N.S. 406). Secondly, the plaintiff could not be dismissed without notice, a verbal contract being in existence. Thirdly, the contract having been partly performed, was taken out of the Statute of Frauds, s. 4.

BRETT, L.J....The contract was made on Saturday; and the terms were that the plaintiff was to commence his service on the Monday, and to serve for a year from the Monday, and to be paid for a year from the Monday. Therefore the contract was not to be performed within a year, and falls within the Statute of Frauds, s. 4. It was contended that *Cawthorne v. Cordrey* was contrary to our decision. That case contains two things, one a decision, and the other a dictum. The decision is not against our judgment; for it was that (although the parties spoke to each

other on a Sunday) there was evidence upon which the jury might find that the contract was made on the Monday; and that contract was for service for a year from that Monday, and the service was to be performed within a year from that time. That decision was in accordance with all the other cases....There was, however, a dictum of Willes, J., that if a contract is made on a day, say Monday, for a service for a year, to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract. [For,] inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the law did not count that half day of the Monday; and therefore the contract was to be performed within 365 days after it was made. This view was founded upon a fiction, namely, that the law takes no notice of part of a day. I am not prepared to say that under like circumstances one might not follow that dictum¹. It is not necessary to say so here. This contract was made on the Saturday, and the service was not to begin until the Monday; that is, not the next day to Saturday, but the day save one after.

To say that the Sunday is not to be counted in the year's service would not do, because if one Sunday is not to be counted, no Sunday is to be counted....

No rule will be granted as to the point whether the contract is within the statute. But the plaintiff may take a rule upon the questions whether the operation of the Statute of Frauds, s. 4, may be defeated by part performance, and whether the plaintiff was entitled to any notice of dismissal, a verbal contract being in existence.

* * * * *

Firth, in support of the rule. A contract falling within the prohibition of the Statute of Frauds, s. 4, is void to all intents and purposes: *Carrrington v. Roots* (2 M. & W. 248); *Reade v. Lamb* (6 Ex. 130). A contract that is void in part is void altogether: *Thomas v. Williams* (10 B. & C. 664). Therefore the contract of Saturday may be treated as no contract; and a fresh contract of service may be implied from the acts of the parties.

As to the doctrine of part performance, it is true that the Court of Chancery formerly applied it only to contracts for the sale of land, and there may have been a difficulty in decreeing specific performance of a contract for personal services. But the Court of Chancery would not allow the provisions of a statute to defeat a claim which good conscience required to be carried out: *Bond v. Hopkins* (1 Sch. & L. 413); *Morphett v. Jones* (1 Swan. 172). The defence set up by the defendant is wholly against good conscience. And now by the Judicature Act, 1873, the doctrine of equity may be applied to cases decided in the Common Law Divisions.

BRETT, L.J....It is contended that as the plaintiff did on Monday the 23rd of April, enter into the defendant's service and continue in it for

¹ [EDITOR'S NOTE. It was followed in *Smith v. Gold Coast A.A.E. Ltd.* (L.R. [1903] 1 K.B. 285). There, by thus excluding the fraction of a day, the Court unanimously held that an agreement on Dec. 6, to serve "for one year, commencing on Dec. 7," would be enforceable, though not in writing.]

some months, another contract to serve for a year ought to be implied, attended with the same consequences as the original contract, but outside the Statute of Frauds. It is alleged that this contract can be implied, because the contract originally entered into is void. But, according to the true construction of the statute, it is not correct to say that the contract is void. The contract exists, but no one is liable upon it. It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only; to infer from them a fresh contract would be to draw an inference contrary to the fact....Reliance was placed upon *Carrington v. Roots*, and *Reade v. Lamb*. These two cases were considered in *Leroux v. Brown* (12 C.B. 801), and Jervis, C.J., took the same view of them as I do, namely, that the contract is not void, but only incapable of being enforced. If the contrary view had prevailed, it would have decided that s. 4 had a territorial operation; whereas if it applies merely to the enforcement of the contract, then it is a statute with respect to procedure, and is applicable to contracts made abroad as well as in England.

It has been further contended that as the contract of the 21st of April has been partly performed, it may be enforced notwithstanding the Statute of Frauds, and the equitable doctrine as to part performance be applied to it. Where a contract for the sale of land had been partly performed, Courts of Equity did in certain cases enforce it. But this doctrine was exercised only as to cases concerning land, and was never extended to contracts like that before us. Those Courts could not entertain suits for specific performance of contracts of service. As to the application of the doctrine of part performance to suits concerning land, I will merely say that the cases in the Court of Chancery were bold decisions on the words of the statute. The doctrine was not extended to any other kind of contract before the Judicature Acts: can we so extend it now? The true construction of the Judicature Acts is that they confer no new rights, they only confirm the rights which previously were to be found existing in the Courts either of Law or of Equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure. Before the passing of the Judicature Acts no one could be charged on this contract either at law or in equity; and if the plaintiff could now enforce this contract, it would be an alteration of the law.

COTTON, L.J....To hold that s. 4 of the statute makes void verbal contracts falling within its provisions, would be inconsistent with the doctrine of the Courts of Equity with regard to part performance in suits concerning land. If such contracts had been rendered void by the legislature, Courts of Equity would not have enforced them....It has been argued that the contract may be enforced, because it has been in part performed. It has been said that the principle of the doctrine as to part performance is that the Court will not allow one party to a contract to take advantage of part performance of the contract, and permit the other party to change his position, and then to allege that the contract does not exist; for this would be contrary to conscience. It is not the real explanation of the doctrine; for if it were, part-payment of the purchase-money would defeat the operation of the statute. But it is well established that the

receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th section. The true ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would, *primâ facie*, make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed; and would therefore allow verbal evidence to be given to shew the real circumstances under which possession was taken....The doctrine as to part performance has always been confined to questions relating to land; it has never been applied to contracts of service, and it ought not now to be extended to cases in which the Courts of Chancery never interfered¹.

* * * * *

Rule discharged.

✓ BAILEY AND ANOTHER v. SWEETING.

COMMON PLEAS. 1861.

9 C.B.; N.S. 843.

[Sale of goods—Sufficiency of memorandum.]

THIS was an action brought to recover a sum of £76. 14s. 3d. for goods bargained and sold. The defendant paid £38. 3s. 9d. into court, and as to the rest of the claim pleaded Never Indebted.

The defendant was a furniture-dealer at Cheltenham: the plaintiffs were manufacturing upholsterers and cabinet-makers in London. In July, 1859, the defendant called at the plaintiff's place of business in London, and then purchased five chimney-glasses (a "job-lot," as it was called), *which were to be paid for by cheque on delivery*. He at the same time purchased other goods *on credit* to the amount of £39. 10s. 9d., some of which had to be made for him. The chimney-glasses were packed and sent by carrier, addressed to the defendant at Cheltenham. They were, however, found to be so damaged when they reached their destination that the defendant refused to receive them, and at once communicated such refusal to the plaintiffs.

The other goods were subsequently forwarded at three different times, with separate invoices, and were duly received by the defendant. The value of these parcels was covered by the payment into court: and the question was, whether the defendant was liable in respect of the chimney-glasses, the value of which with the cases was £38. 10s. 6d.

On the part of the plaintiffs it was insisted that the whole of the goods were sold under one contract, and that the case was taken out of the Statute of Frauds (29 Car. 2, c. 3, s. 17) by the acceptance of part. They also relied upon the following letter addressed to them by the defendant, as being a sufficient memorandum: "The only parcel of goods selected for ready money was, the chimney-glasses, amounting to £38. 10s. 6d.,

¹ [EDITOR'S NOTE. In *Maddison v. Alderson* (8 App. Ca. 467) the House of Lords approved these words; and refused to apply the doctrine to contracts that concerned any other subject-matter than land.]

which goods I have never received, and have long since declined to have for reasons made known to you at the time. With regard to the other items, viz. £11. 4s. 9d., £14. 13s. and £13. 13s., for goods had subsequently, those goods are I believe subject to the usual discount of £5 per cent.: and I am quite ready to remit you cash for these parcels at once."

For the defendant it was insisted that the contract for the chimney-glasses was a separate and distinct contract, and void for want of a sufficient memorandum. [Erle, C.J., at trial], left it to the jury to say whether the bargain for the chimney-glasses was a separate and distinct bargain from that for the rest of the goods; telling them, that, if they were of that opinion, they must find for the defendant.

The jury found that the two were separate and distinct transactions, and accordingly returned a verdict for the defendant.

Hawkins, Q.C., obtained a rule nisi to enter a verdict for the plaintiffs for £38. 10s. 6d., on the ground that the defendant's letter was a sufficient note in writing to satisfy the Statute, or for a new trial on the ground that the verdict was against evidence.

* * * * *

WILLIAMS, J....As the price of the goods bargained for exceeded the value of £10, the contract was not an actionable one unless the 17th section of the Statute of Frauds were complied with; that section¹ enacting, "that no contract for the sale of any goods, wares, and merchandizes for the price of £10 sterling or upwards, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold and actually receive the same, or (2) give something in earnest to bind the bargain or in part of payment, or (3) that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." ...The question in the present case, is, whether such a memorandum has come into existence. It is plain to my mind that the letter of the 3rd of December recites all the essential terms of the bargain: and the only question is whether it is the less a note of the bargain, because it is accompanied by a statement that the defendant does not consider himself liable in law for the performance of it. There is nothing in the Statute to warrant that. I think the Statute is satisfied, and that the contract is an actionable contract....There was a valid contract, and the memorandum was a sufficient memorandum. The intention of the defendant to repudiate or abandon the contract cannot affect the question as to the sufficiency or insufficiency of it.

WILLES, J....It is urged that this letter was not a sufficient note to satisfy the Statute, because it is accompanied by a statement shewing

¹ [EDITOR'S NOTE. The section is now replaced by the closely similar clause in the Sale of Goods Act, 1893, s. 4 (1): "A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing be made and signed by the party to be charged or his agent on that behalf."]

that the defendant did not wish to be bound by the contract. To hold that that circumstance is to operate, to prevent the letter being such a memorandum as the Statute contemplated, would be depriving the word "some," of its natural effect. The requisites of the Statute have been complied with: and there is nothing in the Statute to say that the note or memorandum is to be defeated by any collateral circumstances.

Rule absolute.

[EDITOR'S NOTE. *Buxton v. Rust* (L.R. 7 Exch. 279) confirms this rule, that a memorandum recognising the terms of the agreement does satisfy the Statute notwithstanding that it goes on to repudiate the bargain.]

TAYLOR v. SMITH.

QUEEN'S BENCH DIVISION. 1892.

L.R. [1893] 2 Q.B. 65.

[Sale of Goods—Several Documents—Acceptance.]

APPEAL of plaintiffs from judgment of Wright, J., dismissing the action, which was to recover the price of timber sold and delivered to the defendant.

In October, 1890, the defendant, who carried on business at Manchester, orally agreed with the plaintiffs, who were timber merchants at Liverpool, to purchase from them 1060 spruce deals, which were to be of fair average quality, and were to be delivered in Liverpool to Kenworthy, a carrier chosen by the defendant, and to be carried to Manchester in Kenworthy's barge. The deals were delivered to Kenworthy, who conveyed them to Manchester, and on October 23rd sent an advice note to the defendant: "The undermentioned goods consigned to you having arrived at this station, we will thank you for instructions as to their removal, as they remain here to your order, and are now held by us not as common carriers, but as warehousemen at owner's sole risk of loss or damage or deterioration by fire." The schedule at the foot of the note mentioned the number of the deals, 1060, and named the plaintiffs as consignors, but did not mention the price, nor refer to any other document. The deals were landed on the 28th, on which day, and again on the 29th, the defendant inspected them at the wharf. There was contradictory evidence as to whether the defendant did not again inspect them on November 5; but this was not established. It did not appear that he moved them or did anything more than look at them. He admitted that he frequently kept timber at the wharf.

On October 29th or November 5th the defendant wrote across the advice note: "Refused. Not according to representation. John Smith." On November 5th, Kenworthy communicated this refusal to the plaintiffs. In the meantime the plaintiffs had sent to the defendant an invoice as follows: "Mr John Smith, Manchester. Bought from Messrs Charles Taylor, Sons and Co., 1060 spruce deals. Free to flat, 100l. 11s. 4d., per Kenworthy's flat, Arthur."

This invoice was sent to the defendant in a letter of October 30th. To this letter the defendant returned no answer. On November 8th the defendant wrote to the plaintiffs as follows: "With reference to the deals

refused by me now lying at Kenworthy's, they are not according to representation, and much inferior in quality to any St Johns spruce deals I have seen. I consider them fully 10s. per standard below average value and therefore cannot accept same."

The defences at the trial were, first, that the quality of the goods was not according to the bargain, and, second, that the 17th section of the Statute of Frauds¹ had not been complied with. The learned judge [sitting without a jury] held that there had been no acceptance of the goods sufficient to satisfy the Statute.

Bigham, Q.C., and *A. Rutherford*, for the plaintiffs. First, there was a sufficient memorandum in writing within the Statute. The invoice and the advice note on the face of them relate to the same subject-matter, for in each 1060 deals are mentioned, and it is absurd to suppose that another 1060 deals were to come from the same quarter. If two documents on the face of them without parol evidence relate to the same subject-matter, and the terms of a contract can be made out from them, then if one of them is signed by the party to be charged, the Statute is satisfied. If the defendant had written his refusal on the invoice instead of on the advice note, there clearly would have been a sufficient memorandum. What the defendant did comes substantially to the same thing. The letter of November 8th, when read with the other documents, confirms this view. The defendant there admits the existence of a contract to buy the goods.

Secondly, assuming that there was not a sufficient memorandum in writing, there was an acceptance of the goods within the meaning of the Statute.

...In *Page v. Morgan* (L.R. 15 Q.B.D. 228) the Master of the Rolls distinctly states that examination of the goods admitted a contract and amounted to acceptance. What must be considered is whether the purchaser has done something which can only be accounted for on the supposition that there is a contract. The doctrine that there was no acceptance while a right to reject the goods on the ground of defective quality remained, has been put an end to by *Morton v. Tibbett* (15 Q.B. 428), a case which is strongly in favour of the plaintiffs. Acceptance is to be inferred from delivery of the goods at what was in effect the defendant's own wharf, and from the delay in communicating any refusal to the plaintiffs.

Acceptance within the Statute cannot be taken to mean acceptance of the goods as conforming to the contract so as to preclude the acceptor from rejecting them as not corresponding to it, but must mean some act which can only be explained by the existence of a contract. If a purchaser on being told that goods have arrived for him, instead of saying that he has nothing to do with them, examines them and then states that he rejects them as not being according to representation, his acts are only consistent with his having contracted to buy such goods; *Page v. Morgan*.

LORD HERSCHELL....The first question is whether there was a memorandum in writing signed by the defendant of the terms of the

¹ [EDITOR'S NOTE. See its terms, and those of the corresponding enactment of 1893 in the preceding case.]

contract. No letter was written by him which contained any direct reference to the invoice. It is obvious that the advice note, the indorsed memorandum, and the letter do not by themselves constitute such a memorandum, for the terms of the bargain are not to be found in them. If any of them had referred to or incorporated the invoice, there would have been a sufficient memorandum; but it is impossible to say that the invoice is incorporated with or referred to in any of them. There is therefore no memorandum to satisfy the Statute.

The second point is this, that there was an acceptance of the goods and an actual receipt of them by the purchaser. About the receipt there is no difficulty. The goods were sent to the defendant on the flat of Kenworthy, the carrier chosen by him, were landed at Kenworthy's wharf, and notice of their arrival was sent to the defendant by Kenworthy informing him that they were then at his order. But the Statute requires that the goods, or some part thereof, shall have been accepted as well as received. Acceptance therefore means something beyond receipt; receipt alone is not enough. That receipt by a carrier designated by the purchaser is not enough to constitute an acceptance has been settled. What have we here beyond the receipt?...I cannot think that the mere inspection of the goods by the defendant amounted to acceptance; even accompanied with such delay as there was in communicating with the vendors. No doubt you might have a case in which there was such an amount of delay after the goods had been placed in the custody directed by the purchaser as to prevent the purchaser from withdrawing. But here there has been no such lapse of time as can preclude the purchaser from denying that he has accepted the goods. I think that no case has gone quite so far as we should be going if we were to say that there was here¹ evidence on which a jury might properly find acceptance. In *Page v. Morgan*, after some of the sacks had been taken into the defendant's mill, the defendant there opened them. In the present case all that appears is that the goods were at the carrier's wharf and the defendant there looked at them. I think that this mere looking at them cannot be held to amount to acceptance.

LINDLEY, L.J....As regards acceptance—apart from *Morton v. Tibbett* (15 Q.B. 428)—I should have thought it plain that there was no acceptance at all. If a man merely looks at goods, and then says he rejects them, how can it be said that he has accepted them? *Morton v. Tibbett* was a peculiar case; for the purchaser resold the goods before he saw them. That was a distinct dealing with the goods, and was held to be such an acceptance as to satisfy the Statute; though not such an acceptance as to preclude him from rejecting them if, when he examined them, he found that they were not according to sample. Hence was developed the doctrine that there may be an acceptance within the Statute,

¹ [EDITOR'S NOTE. Contrast *Abbott v. Wolsey* (L.R. [1895] 2 Q.B. 97): where after delivery of the goods to the defendant, he kept the delivery-note, took a sample from the goods, examined it, and refused the goods as not according with the sample he had received originally. The Court of Appeal held that this was evidence sufficient to support a verdict that he had accepted them within the meaning of the Statute. Cf. *Taylor v. G.E. Ry., infra*, p. 118.]

and yet not such an acceptance as to prevent the purchaser from repudiating the goods on the ground that they are not according to the contract. It appears from *Page v. Morgan* that the test is, whether there has been such a dealing with the goods as amounts to a recognition of the contract¹. The jury there found that there had been acceptance, and the Court of Appeal refused to disturb the verdict. The Master of the Rolls said: "I rely, for the purposes of my judgment in the present case, on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract." Whether I should have gone so far I need not say. In the present case, the defendant merely went and looked at the goods, on two occasions; and, finding that they were not what he wanted, he rejected them. I think that there was no acceptance in any sense of the word.

KAY, L.J....One of the strongest cases as to connecting documents is *Long v. Millar* (L.R. 4 C.P.D. 450). There the plaintiff agreed to purchase three lots of land at Hammersmith, and signed a document which was a sufficient memorandum of agreement in every respect except that it did not refer to the vendor. The purchaser paid a deposit, and the vendor signed a receipt containing the name of the plaintiff and the amount of the deposit, which was referred to as a deposit "on the purchase of three plots of land at Hammersmith." The Court of Appeal held that the words referring to the purchase were sufficient to incorporate the memorandum signed by the plaintiff, and that the two formed a written contract which satisfied the Statute. The present case wants the main element of *Long v. Millar*, the existence, in a document signed by the defendant, of words referring to a contract of purchase. I therefore think that there was no memorandum which satisfies the Statute.

Appeal dismissed.

TAYLOR v. GT EASTERN RY CO.

QUEEN'S BENCH DIVISION. 1901.

L.R. [1901] 1 Q.B. 774.

[*Sale of Goods—Unenforceable agreement—Passing of ownership.*]

[THE plaintiff was trustee in the bankruptcy of one Sanders who had bought from Barnard Brothers a quantity of barley, which was on the defendants' railway. Barnards, as unpaid vendors, claimed to stop the barley in transitu. The defendants gave it up to them. The plaintiff sued for conversion.]

Lush, for defendants. There was no valid contract of sale; Sanders' mere attempt to resell goods, which he had not inspected, was not an acceptance of them. Then, if the contract was not binding on him, no property passed to him under it....It is true that s. 17 of the Statute of

¹ [EDITOR'S NOTE. Now, by s. 4 (3) of the Sale of Goods Act, 1893, "There is an acceptance of goods, within the meaning of this section, when the buyer does any act, in relation to the goods, which recognises a pre-existing contract of sale; whether there be an acceptance in performance of the contract, or not."]

Frauds differs from s. 4 of the Sale of Goods Act, 1893¹; the former saying "no contract...shall be allowed to be *good*," but the latter, "shall not be *enforceable by action*."...But the inability to enforce the contract is enough to prevent the property from passing.

* * * * *

BIGHAM, J....Sanders had certainly received the goods....He had tried to sell them. He had, moreover, kept them for a month. These circumstances, in my opinion, amount to an acceptance....There could not be a clearer "act recognising a pre-existing contract of sale" [Sale of Goods Act, s. 4 (3)] than the attempt to resell....

This view makes it unnecessary to consider the [other] point of law; but I should like to say a word or two about it....The [non-fulfilment of the condition of the Sale of Goods Act] does not make a contract void or even voidable. The only effect is that is unenforceable by action. The contract being good, all the [other] legal consequences of a contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer. It may be asked, "What happens if the buyer, after making the purchase, refuses to fulfil any of the statutory conditions?"...The property has passed to him, and it may be that he has received the goods themselves; yet he cannot be sued for the price. My answer is that the seller may call on the buyer to pay for the goods; and, if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to revest the property in the seller, and to entitle him to resume possession....

Judgment for plaintiff.

¹ [EDITOR'S NOTE. See their respective terms on p. 114 *supra*.]

CHAPTER III

CONSIDERATION

SECTION I

NECESSITY OF CONSIDERATION

RANN AND ANOTHER, EXECUTORS OF MARY HUGHES
v. ISABELLA HUGHES, ADMINISTRATRIX OF J. HUGHES.

HOUSE OF LORDS. 1778.

7 TERM REPORTS, 350, NOTE (A).

[Agreement in writing—Want of consideration—Nudum Pactum.]

THE declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiffs' testator 983*l.*; that the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death, the said sum of 983*l.* was unpaid, "by reason of which premises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay &c." The defendant pleaded non assumpsit; plene administravit; and plene administravit, except as to certain goods &c. which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth &c. The replication took issue on these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant de bonis propriis. This judgment was reversed in the Exchequer-chamber; and a writ of error was afterwards brought in the House of Lords, where after argument the following question was proposed to the Judges by the Lord Chancellor, "Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity."

Lord Chief Baron SKYNNER delivered the opinion of the Judges. It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration. Such agreement is nudum pactum ex quo non oritur actio; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix promised to pay when

requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be coextensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right: but here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise *generally* to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing. And this last is certainly true; but that "there cannot be *nudum pactum* in writing," whatever may be the rule of the civil law, there is certainly none such in the law of England....All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class (as some of the counsel have endeavoured to maintain) as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable.

His Lordship here read those sections of that Statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law; and does not prove the converse of the proposition that when in writing the party must be at all events liable. He here observed upon *Pillans v. Van Mierop* (3 Burr. 1663) and *Losh v. Williamson* (Mich. 16 G. 3 in B.R.). So far as these cases went on the doctrine of *nudum pactum* he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put must be answered in the negative.

Judgment of Exchequer Chamber affirmed.

LEES v. WHITCOMB.

COMMON PLEAS. 1828.

5 BINGHAM, 34.

[*Promise to learn—No Promise to teach implied—Want of Consideration.*]

ASSUMPSIT. The plaintiff declared, in the fourth count of his declaration, that in consideration the plaintiff, at the special instance and request of the defendant, would receive the defendant into his service, and cause her to be taught the trade and business of a dress-maker and milliner by the wife of the plaintiff, the defendant agreed and undertook and faithfully promised the plaintiff to continue with the wife of the plaintiff for two years, from the 5th of June, 1826, for the purpose of learning the business.

Averment of the defendant's reception and instruction by the plaintiff's wife, and of her staying in his service till April 14th, 1827. Breach, her refusal to remain in his service for the remainder of the period of two years.

In the fifth count the consideration was stated to be simply the receiving the defendant into his service, and the undertaking to serve.

There were other counts; but these came nearest to the agreement between the parties, and were the only ones relied on. Plea, non-assumpsit.

At the trial before Park, J., the plaintiff, in support of his action, gave in evidence the following agreement, signed by the defendant:

"I hereby agree to remain with Mrs Lees, of 302 Regent Street, for two years from the date hereof, for the purpose of learning the business of a dressmaker. As witness my hand this 5th day of June, 1826. Amelia Whitcomb."

No premium was paid by the defendant, who, on the day mentioned in the agreement, entered the plaintiff's house, and left him in April following; by which time she had made such progress in learning the business that her services were becoming valuable to the plaintiff. It appeared that dressmaking and millinery were two distinct businesses.

On the part of the defendant it was objected, that there was no mutuality in the above agreement, and that, therefore, it was not binding on the defendant; that the plaintiff not having bound himself to teach, although the defendant had agreed to remain and learn, there was an entire absence of consideration for the defendant's agreement; and that the agreement given in evidence did not correspond with that set out in the declaration. The plaintiff was thereupon nonsuited.

Taddy, Serjt., moved for a new trial. The defendant could not engage to learn without an implied engagement on the part of the plaintiff to teach, so that the consideration sufficiently appears in the engagement to learn.

[*Per Curiam.* The fourth count alleges the consideration to be to teach the business of a dress-maker and milliner; it was proved that the two businesses were distinct, and the writing put in evidence mentions only the business of a dress-maker.]

But the word *service* as employed in the fifth count is usually and properly applied on the relation between master and apprentice, and

therefore, includes the required consideration of the teaching, and gives sufficient mutuality to the contract. As to the omission of the plaintiff's signature, it is sufficient if a memorandum of a bargain be signed by one of the parties to the contract; *Egerton v. Matthews* (6 East 306).

BEST, C.J....The contract does not bear the meaning which is put upon it in the declaration. The businesses of milliner and dress-maker are very different, and that disposes of the fourth count. The fifth count alleges the consideration to be the plaintiff's receiving the defendant into his service, and the undertaking, an engagement to serve; but there is by the contract no obligation on the defendant to serve; her engagement is merely to remain for two years; and the plaintiff could not have compelled her to serve. It was probably the plaintiff's intention to prevent the defendant from leaving him and setting up for herself the moment she had learned his business, and there might have been a sufficient consideration for that if he had undertaken to teach; but there is nothing in the agreement to insure such instruction to the defendant.

BURROUGH, J. There is no consideration expressed in the agreement for the defendant's undertaking; and since the case of *Wain v. Warlters* (5 East 10) that is indispensable.

GASELEE, J. The service in the fifth count is alleged generally, and not as a service for the purpose of learning. I feel some difficulty, but not sufficient to render it necessary for me to differ from the rest of the Court.

Rule discharged.

[EDITOR'S NOTE. So in *Sykes v. Dixon* (9 A. & E. 693), where a workman had signed a promise to work for Sykes "and no other person whatsoever" for a specified time, but Sykes had made no promise to employ him, this want of mutuality was held fatal.]

DUNLOP P. T. CO. LD. v. SELFRIDGE & CO. LD.

HOUSE OF LORDS.

L.R. [1915] A.C. 847.

[Consideration must move from promisee.]

THE plaintiffs agreed with Dew and Co. that the latter, as middlemen, should sell the Dunlop tyres and covers, receiving discounts thereon. Dew and Co. undertook not to sell below certain prices, and not to sell to purchasers who would not give a similar undertaking to maintain the plaintiff's prices. Dew and Co. sold some covers to the defendants; the latter, in consideration of a trade discount, entering on Jan. 2nd, 1912, into a written agreement not to sell Dunlop motor tyres, covers, or tubes, below list-prices. This written agreement also contained a clause agreeing to pay to the Dunlop Company the sum of £5 as liquidated damages for any such article sold below list-price; "without prejudice to any other remedies which you or the Dunlop Company may have hereunder." The defendants having sold two Dunlop covers below list-prices, the plaintiffs claimed an injunction and damages for the breach of this agreement, which they alleged to have been made with themselves through Dew and Co. as their agents.

Phillimore, J., gave judgment for the plaintiffs, which was reversed by the Court of Appeal. On appeal thence to the House of Lords:

Younger, K.C., for appellants. The appellants are undisclosed principals....Dew and Co. were known to the respondents to be acting as agents of the appellants. That the expressed consideration is to be paid by Dew and Co. does not preclude them from saying that they are agents. There was a consideration moving from the appellants to the respondents ...the permission to Dew and Co. (with the knowledge of the respondents) to sell tyres to the respondents on favourable terms, of which terms the respondents take advantage....Parol evidence of this consideration is admissible, for such evidence does not contradict the written contract: *Frith v. Frith* (L.R. [1906] A.C. 254).

VISCOUNT HALDANE, L.C....In the law of England certain principles are fundamental. One is, that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of Contract. Such a right might be conferred by way of Property, as, for example, under a trust; but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that, if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor, or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain Continental countries or of Scotland; but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But, to entitle him so to sue, he must have given consideration either personally, or through the promisee acting as his agent in giving it.

In the case before us, the consideration, (the allowance of what was in reality part of the discount to which Messrs Dew, the promisees, were entitled as between themselves and the appellants), was to be given by Messrs Dew on their own account; and was not in substance, any more than in form, an allowance made by the appellants. The case for the appellants was that they permitted and enabled Messrs Dew, with the knowledge and by the desire of the respondents, to sell to the latter on the terms of the contract. But, even if that was so, the answer is conclusive. Messrs Dew sold to the respondents goods which they had a title to obtain from the appellants independently of this contract. The consideration by way of discount, under the contract of January 2, was to come wholly out of Messrs Dew's pocket, and neither directly nor indirectly out of that of the appellants. If the appellants enabled them to sell to the respondents on the terms they did, this was not done as any part of the terms of the contract sued on.

No doubt it was provided as part of these terms that the appellants should acquire certain rights; but these rights appear on the face of the contract as *jura quaesita tertio*; which the appellants could not enforce. Moreover, even if that difficulty be got over by regarding the appellants as the principals of Messrs Dew in stipulating for the rights in question, the only consideration disclosed by the contract is one given by Messrs Dew, not as agents, but as principals acting on their own account.

This conclusion as to consideration renders it unnecessary to decide the further question as to whether the appellants can claim that a bargain was made in this contract by Messrs Dew as their agents; a bargain which (apart from the point as to consideration) they could therefore enforce. If it were necessary to express an opinion on that further question, a difficulty as to the position of Messrs Dew would have to be considered. Two contracts—one by a man on his own account as principal, and another by the same man as agent—might be validly comprised in the same piece of paper. But they must be two contracts, and not one as here. I do not think that a man can treat one and the same contract as made by him in two capacities. He could not be regarded as contracting for himself and for another *uno flatu*.

The form of the contract which we have to interpret leaves the appellants in this dilemma;—that if they say that Messrs Dew contracted on their behalf, they gave no consideration; and if they say they gave consideration in the shape of a permission to the respondents to buy, they must set up further stipulations, which are neither to be found in the contract sued upon nor are germane to it, but are really inconsistent with its structure. That contract has been reduced to writing; and it is in the writing that we must look for the whole of the terms then made between the parties. These terms cannot, consistently with the settled principles of English law, be construed as giving to the appellants any enforceable rights as against the respondents.

LORD DUNEDIN....What did Dunlop do or forbear to do, in question with Selfridge. The answer must be—nothing. He did not *do* anything; for Dew, having the right of property in the tyres, could give a good title to any one he liked; subject, it might be, to an action for damages at the instance of Dunlop for breach of contract (which action, however, could never create a *vitium reale* in the property of the tyres). He did not *forbear* in anything, for he had no action against Dew which he gave up; because Dew had fulfilled his contract with Dunlop, in obtaining, on the occasion of the sale, a contract from Selfridge in the terms prescribed....

LORD SUMNER....In this transaction nothing moved from the appellants to the respondents. It would have been the same if the other firm had not existed. The appellants have sued on a *nudum pactum*....

* * * * *

Appeal dismissed.

[EDITOR'S NOTE. In the Court of Appeal, Vaughan Williams, L.J., had summed up the matter thus tersely—"There never was privity of contract between the plaintiff and defendant at all; and therefore there could be no breach of a contract that did not exist."

Cf. with this case *Evans v. Hooper* (L.R. 1, Q.B.D. 45); where the manager of an Insurance Association sued upon one of its policies, which he treated as a contract *with himself* by the assured to observe the rules of the policy. The consideration alleged by him was his having signed it. But as he had signed "on behalf of the members" of the Association, thus imposing no personal liability upon himself, the alleged consideration was held to be (not merely inadequate but) non-existent.]

SECTION II

NATURE AND REALITY OF CONSIDERATION

ELEANOR THOMAS v. BENJAMIN THOMAS.

QUEEN'S BENCH. 1842.

2 Q.B. 851.

[Consideration and motive—Payment of ground rent—Agreement to repair.]

ASSUMPSIT. The declaration stated an agreement between plaintiff and defendant that the defendant should when thereto required by the plaintiff, by all necessary deeds...assure a certain dwelling-house and premises, unto plaintiff for her life, or so long as she should continue a widow and unmarried; and that plaintiff should, at all times during which she should have possession of the said dwelling-house and premises, pay to defendant and one Samuel Thomas the sum of 1*l*. yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and keep the said dwelling-house and premises in good and tenantable repair: That the said agreement being made, in consideration thereof and of plaintiff's promise to perform the agreement, Samuel Thomas and the defendant promised to perform the same.

It alleged a breach of this agreement.

John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling-houses in Merthyr Tydvil, in one of which (being the dwelling-house in question) he was himself residing. And by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of all his houses, subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before his death, he expressed orally a wish to make some further provision for his wife; and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of 100*l*. instead thereof.

This declaration being afterwards brought to the knowledge of Samuel Thomas and the defendant (the executors and residuary legatees), they consented to carry the intentions of the testator so expressed into effect; and, after the lapse of a few days, they and the plaintiff executed an agreement; which, after stating the parties, and briefly reciting the will, proceeded as follows.

"And, whereas the said testator, shortly before his death, declared, in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling-house, &c., or 100*l*. out of his personal estate," in addition to the respective legacies and bequests given her in and by his said will; "but such declaration and desire was

not reduced to writing in the lifetime of the said John Thomas and read over to him; but the said Samuel Thomas and Benjamin Thomas...are willing and desirous that such intention should be carried into full effect: Now these presents witness...that, in consideration of such desire and of the premises," the executors would convey the dwelling-house, &c. to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried: "provided nevertheless...that the said Eleanor Thomas, or her assigns, shall at all times during which she shall have possession of the said dwelling-house &c., pay to the said Samuel Thomas and Benjamin Thomas, their executors, &c., the sum of 1*l.* yearly towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and shall and will keep the said dwelling-house and premises in good and tenantable repair": with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling-house and premises for some time. But the defendant, after the death of his co-executor, refused to execute a conveyance tendered to him for execution pursuant to the agreement; and brought an ejectment, under which he turned the plaintiff out of possession. It was objected for the defendant that, a part of the consideration proved being omitted in the declaration, there was a fatal variance. The learned Judge overruled the objection, reserving leave to move to enter a nonsuit. A verdict was found for the plaintiff.

* * * * *

E. V. Williams, for defendant. The consideration alleged in the declaration is solely the promise to pay rent and repair: therefore it lay on the plaintiff to prove that to have been the true and sole consideration: *Beech v. White* (12 A. & E. 668). But the evidence shews that the testator's declaration, as recognised by the executors, was part, if not the whole, of the consideration. It is conceded that where there is a good legal consideration conjoined with a moral one, it is not necessary to state both. But here regard for the testator's intentions was not, under the circumstances, a mere moral consideration; for the declaration had been made, and reduced to writing, so formally that it might well be thought valid in law; and so the agreement be made by the executors and residuary legatees to buy peace¹. If the testator's expressed wish was part or the whole of the consideration, the declaration should have so alleged it; and a nonsuit ought to be entered. But, in fact, if it be not the consideration, there is no legal consideration at all: this is a mere gift *cum onere*; and, had it been stated truly, the declaration would have been bad on general demurrer.

[PATTESON, J. The rent, if issuing out of the house, might follow the gift; but the obligation to repair does not.]

The property was held under a superior landlord: the assignee's obligation to pay rent and repair would therefore be implied from the very state of things which existed between the parties.

[LORD DENMAN, C.J. There is nothing to shew who was liable to pay the ground-rent.]

¹ See *Haigh v. Brooks*, (10 A. & E. 309), *infra*.

[COLERIDGE, J. The *ll.* is reserved payable to the executors: it is quite different from an assignee's liability.]

Still the annexing of such a payment cannot be regarded as the consideration. What is meant by the *consideration* for a promise, but the cause or inducement for making it? Plowden (309), "Note that by the civil law *nudum pactum* is defined thus: *Nudum pactum est ubi nulla subest causa praeter conventionem; sed ubi subest causa, fit obligatio, et parit actionem.*" The rent and repairs cannot be said to have been the cause or motive which induced the executors to make this agreement: it must have been such a belief as is recited in the agreement itself, which, though a good moral consideration (and perhaps sufficient to raise a use) is not sufficient to support a promise. The proviso merely causes the donee to take the gift charged with the burthen of paying the rent and keeping the premises in repair; and she cannot turn these conditions into a consideration. It is clear that, if the proviso had not existed, the executors might have retracted at any moment; their right to do so cannot be qualified by the circumstance that the gift was *cum onere*; otherwise, when carried out to conveyance, it would be a conveyance on good, as distinguished from valuable, consideration. Suppose a subsequent sale; a purchaser for value would have been entitled, though he had purchased with notice of the gift. A consideration to be sufficient against such a purchaser within the saving clause of the 27 Eliz. c. 4, s. 4, must be such a consideration as would support an assumpsit. Were it otherwise, donees by voluntary gift would confirm their estates by covenanting to repair a monument, maintain a plantation, or the like. Here the donors, in effect, say, that the donee is to pay no purchase-money, but is to do what a purchaser for full consideration would have to do, pay the rent and maintain in repair. And it is to be observed that, in that part of the agreement, where the purchase-money is usually mentioned, instead of any valuable consideration there is a mere reference to the testator's wishes; which is followed in a different part of the deed by a simple provision for the burthens commonly belonging to and incident to the subject-matter.

LORD DENMAN, C.J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to shew that the ground rent was payable to a superior landlord. The stipulation for the payment of it is not a mere proviso, but an express agreement; and shews a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr Williams's definition of consideration is too large: the word *causa* in the passage referred to means one which confers what the law considers a benefit on the party.

The obligation to repair is one which might impose charges heavier than the value of the life estate.

PATTESON, J. It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant: it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit

to the defendant, or some detriment¹ to the plaintiff; but at all events it must be moving from the plaintiff². Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift: but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burthens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground-rent, and which is made payable not to a superior landlord but to the executors. So that this rent is clearly not something incident to the assignment of the house; for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs: these houses may very possibly be held under a lease containing covenants to repair; but we know nothing about it. For any thing that appears, the liability to repair is first created by this instrument.

Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value. Possibly that might be so. But suppose it would: the plaintiff contracts to take it, and does take it, whatever it is, for better for worse. Perhaps a *bonâ fide* purchase for a valuable consideration might override it; but that cannot be helped.

COLERIDGE, J.... We are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part. *Ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfil the intentions of the testator: but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair....

As to the suggestion of this being a voluntary conveyance, my impression is that this payment of 1*l.* annually is more than a good consideration: it is a valuable consideration: it is clearly a thing newly created, and not part of the old ground-rent.

Rule discharged.

¹ [EDITOR'S NOTE. Thus in *Budgett v. Stratford C. I. Society* (32 T.L.R. 378), an employer announced, early in our war with Germany, to his married workmen, that any of them who joined the army should receive half-wages and should at the end of the war be reinstated. Bray, J., held that the man's joining the army was valid consideration for this promise of his employer.]

² [MR FINCH'S NOTE. In the case of *Currie v. Misa*, L.R. 10 Ex. at p. 162, the following description of consideration is given by the Exchequer Chamber: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."]

FISHER v. RICHARDSON, EXECUTOR, AND HILL.

KING'S BENCH. 1603.

CROKE, JAMES, 47.

[*Forbearance for a definite time a sufficient consideration.*]

ASSUMPSIT. For that the testator being indebted unto him by single contract, the defendant being executor, and having assets in his hands to satisfy all debts and legacies, assumed that, if he forbear to sue him until such a time, he would pay; and alledgeth *in facto*, that he forbore and had assets, &c. Hereupon the defendant demurred.

Hedley argued, for the plaintiff, that inasmuch as the testator was chargeable at the common law in an assumpsit (as hath been adjudged), the duty remains, although he be dead. And (although no action of debt lies against the executor, because the testator might have waged his law), yet an action upon the case lies, with an averment of assets to satisfy. And if in this case, debt be brought against the executor, if he pleads *non debet*, he shall be charged. Therefore the staying of the suit is sufficient consideration to ground this action. And here he might have been sued in Chancery, the staying whereof is good cause of assumpsit.

And of this opinion was the whole Court, without argument. Wherefore it was adjudged for the plaintiff.

LOYD v. LEE.

NISI PRIUS. 1718.

1 STRANGE, 94.

[*Forbearance without cause of action, no consideration.*]

A MARRIED woman gives a promissory note as a *feme sole*; and after her husband's death, in consideration of forbearance, promises to pay it. And now in an action against her, it was insisted that though, she being under coverture at the time of giving the note, it was voidable for that reason; yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But *Pratt, C.J.*, held the contrary, and that the note was not barely voidable, but absolutely void. And forbearance, where originally there is no cause of action, is no consideration to raise an *assumpsit*. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called¹....

¹ [EDITOR'S NOTE. *I.e.*, was nonsuited. In the old practice, if a plaintiff elected for this, the crier was ordered to call him thrice; and if neither he nor any one for him appeared he was nonsuited (Blackstone, III. 376). Plaintiffs preferred a nonsuit to a hostile verdict, because the former created no *res judicata* and left them free to sue again on the same cause of action. (See thus *O'Mealey v. Wilson*.) In the County Courts a nonsuit still has this advantage; but a plaintiff cannot now *insist* on being nonsuited. In the High Court nonsuits ceased in 1875; though the word is still sometimes used there, improperly, to mean that the judge has withdrawn the case from the jury, for lack of evidence, and has entered judgment for the defendant.]

JONES v. ASHBURNHAM AND NANCY HIS WIFE.

KING'S BENCH. 1804.

4 EAST, 455.

[*Forbearance no consideration where no person liable.*]

THE plaintiff declared that whereas one *S. F. Bancroft*, since deceased, at the time of his death was indebted to him in 58*l.* for goods before that time sold and delivered to the deceased, whereof the defendant *Nancy* had notice, and thereupon, after the death of *Bancroft*, the defendant *Nancy*, before her intermarriage with the other defendant *Ashburnham*, in consideration of the premises, and also in consideration that the plaintiff, at the special instance and request of the defendant *Nancy*, would forbear and give day of payment of the said 58*l.* as aftermentioned, she the said *Nancy*, by a note in writing signed by her according to the form of the Statute, &c. on the 20th of March, 1801, undertook and promised the plaintiff to discharge the said debt so due and owing to him in a reasonable time, and to send him 20*l.* in part payment in the July following: and although the same July is long since passed, during which the said *Nancy* continued sole, and a reasonable time elapsed for the payment of the whole 58*l.*, according to the tenor and effect of the said promise, and though the plaintiff has always from the time of making the said promise hitherto forborne and given day of payment of the said debt, whereof the defendant *Nancy* before her intermarriage, and both the defendants since their intermarriage, have had due notice, yet the defendants have respectively, &c. refused to pay, &c. There were other counts in substance the same; one alleging the forbearance to be till July, &c. To all which there was a demurrer, assigning for special causes; that it is not alleged in the declaration from whom the said sum of 58*l.* therein mentioned was due and owing to the plaintiff at the time when the defendant *Nancy* is supposed to have made the promise and undertaking mentioned, or that any persons or person were or was then liable to pay the plaintiff that sum; and that it is not alleged to whom the plaintiff hath forborne and given day of payment of the said 58*l.*; and that the declaration does not disclose any legal and sufficient consideration for the supposed promise; nor does it thereby appear that the plaintiff has any good cause of action against the defendants, &c.

* * * * *

Jervis, for plaintiff. The consideration of general forbearance, as here laid, is sufficient to maintain the assumpsit. To sustain a promise the consideration must either be beneficial to the defendant or detrimental to the plaintiff. In *Pillans v. Van Mierop* (3 Burr. 1673), Yates, J., says, "Any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrue to the party undertaking."...Now here the plaintiff shews a debt due, and a right to recover, though not against any person named: but it is enough that he shews a possibility of loss by the forbearance.

[LORD ELLENBOROUGH, C.J. It is not entitled to the name of forbearance unless you shew something or somebody to be forborne.]

The cases shew that it is sufficient if there be a right in the plaintiff, which is forborne; though not shewn to be capable of being enforced at the time against any particular person. As in *Quick v. Copleston* (1 Lev. 161; 1 Sid. 242; 1 Keb. 866), where the consideration relied on by the Court was the general forbearance, "to forbear till Michaelmas." And yet it was not averred there that either the defendant or any other person was executrix of the deceased debtor; and consequently no person appeared to be liable to the plaintiff at the time....But where a person is sued *as executor*, which was the case in *Rann v. Hughes* (*supra*, p. 121), his liability on a promise to pay can only be coextensive with his original liability in respect of assets.

LORD ELLENBOROUGH, C.J....To make a promise obligatory there must be some benefit to the party making it, or some detriment to the party to whom it is made; otherwise it is considered as *nudum pactum* and cannot be enforced....Now how does the plaintiff shew any damage to himself by forbearing to sue, when there was no fund which could be the object of suit, when it does not appear that any person in *rerum naturâ* was liable to be sued by him? No *right* can exist in this vague, abstract, and indefinite way. *Right* is a correlative term: there must be some object of right; some object of suit; some party who, in respect of some fund or some character known in the law, is liable; otherwise there cannot be said to be any right. Has there been then any *suspension* of the plaintiff's right? Now unless a right can be put in force, there can be no suspension of it. And that it could have been put in force, but for the promise made by the defendant, is not shewn. Then what *forbearance* is shewn? It must be a forbearance of a right which may be enforced with effect. It is true that a promise may be binding though there may be no actual benefit resulting to the party making it, because it is enough if the plaintiff may be damaged by it; but it does not appear here that the forbearance could produce any detriment to the plaintiff....Whether there were any representative or any funds of the original debtor does not appear. Then, as to the cases cited, that of *Rosyer v. Langdale* (Styles, 248) is strong to the purpose; for it was there decided that a promise in consideration that the plaintiff would forbear suit until the defendant had taken out letters of administration was without foundation, because it did not appear that the party was liable before administration taken out. And this was rightly determined; for forbearance of an unfounded suit is no forbearance. But this case is attempted to be met by that of *Hume v. Hinton* (Styles, 304), where a promise by the mother of an intestate indebted to the plaintiff, that if he would stay for the money till a given day she would pay it, was sustained. That, however, was after verdict; and that is material to be attended to, because it might be presumed to have been proved that the defendant had so intermeddled with the intestate's effects as to make herself liable as executrix *de son tort*, and had funds of the deceased in her hands for which (but for the promise made) she might have been sued in that character. But no such intendment can be made here. The case of *Quick v. Copleston* is also relied on. That, too, was after verdict. I think that even after verdict, that declaration would be bad; being vicious on the face of it. It is:

stated that the defendant's late husband was indebted to the plaintiff, and that she (not stating her to be clothed with any representative character) *being in fear to be arrested by the plaintiff*, promised, &c. Now an attempt to impose upon a person an unlawful terror (and the threatening of an unlawful suit is as bad), can never be a good consideration for a promise to pay: yet that ground is insisted on by Hyde, C.J. And as to the case there cited by him, of a mother who promised to pay, on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do; it is contrary to every principle of law and moral feeling. Such an act is revolting to humanity, and illegal; and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said that a promise, in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror. Here, there being no consideration of benefit to the defendant, or of detriment or possibility of detriment to the plaintiff, shewn by him on the face of the declaration (and this coming on upon demurrer, where nothing can be intended, as it may after verdict), I am clearly of opinion that the declaration is bad.

GROSE, J.... There is a great difference between questions of this sort, arising upon demurrer to the declaration, and in arrest of judgment after verdict; in which latter case every thing is to be intended which can be in favour of the verdict: but not so on demurrer....

LAWRENCE, J.... The argument proceeds upon a fallacy, in supposing that some person must exist liable to the plaintiff's suit, to forbear whom must consequently be a disadvantage to him, and a consideration for the defendant's promise. But that is not so. The deceased might leave no assets, and there might be no administration to him taken out: there would then be no person to sue. So he might be a bastard and have no legal representatives entitled to take out administration of his effects, in which case the Crown would be entitled to them; and there would be nobody to be sued. It is not therefore true that there must be somebody liable to whom a forbearance to sue may refer. And if it be no consideration for the promise to forbear *to sue the defendant* without shewing that the defendant was before liable to have been sued, it can be no consideration for a promise to forbear to sue all the world generally, without shewing that some person or other was liable to be sued. For without that, the plaintiff does not shew any detriment arising to him from the forbearance of his suit....

* * * * *

Judgment for defendants.

THE ALLIANCE BANK LIMITED v. BROOM.

CHANCERY. 1864.

2 DREWRY & SMALE, 289.

[*Demurrer—Consideration for Agreement—Existing Debt.*]

THE Alliance Bank opened a loan-account with the defendants; and such loan-account was continued down to the 19th of September, 1864,

when there was a balance due from the defendants to the Bank on such loan-account to the amount of 22,205*l.* 15*s.* 1*d.* The plaintiffs requested the defendants, Messrs Broom, to give them some security for the amount so due; and the defendants, who stated that they were entitled to certain goods, wrote to the manager of the Bank the following letter: "We hand you the following particulars of produce, which we propose to hypothecate against our loan-account, and at the same time undertake to pay the proceeds, as we receive them, to the credit of the said account." The letter then contained a list of goods and their values, and was signed by Messrs Broom.

In pursuance of this letter the plaintiffs, on the 20th of September, applied to the defendants for the warrants for delivery of the goods mentioned in the letter; and the defendants promised to deliver the warrants as soon as they could obtain them from the warehouses.

The bill stated that the defendants refused to deliver the warrants to the plaintiffs, and threatened to deliver them to other persons; and the bill charged that the plaintiffs were entitled to a lien upon the goods mentioned in the letter by virtue of the agreement, and prayed for a declaration to that effect. The bill also prayed that the defendants might be ordered to deliver to the plaintiffs the documents relating to the title of said goods, and cause the said goods to be delivered to the plaintiffs, by way of security for the amount due to them on the loan-account. The bill also prayed an injunction to restrain the defendants from dealing with the warrants or goods in the mean time.

To this bill the defendants filed a demurrer, on the ground that the agreement contained in the letter was without consideration; and therefore one which the Court would not enforce.

Daniel, for the defendants, contended that the agreement contained in the letter was executory; being also without consideration, the Court would not enforce it. The existence of a debt was no sufficient consideration to support the agreement¹. There was a distinction between a motive and a consideration—what might be good as a motive might be bad as a consideration; and that was so in this case. He referred to *Eastwood v. Kenyon* (*infra*), *Thomas v. Thomas* (*supra*, p. 127), *Kaye v. Dutton* (7 M. & Gr. 815).

KINDERSLEY, V.C. The defendant demurs on the ground that the promise to give security, which the plaintiff seeks to enforce, was without any consideration. In support of this, it is argued that the plaintiffs, so far from giving any consideration for the promise, could at any time have brought an action for the payment of the debt. That they could have done so is perfectly true....

A demand was made by the creditor for security; and upon that demand a promise and agreement was made by the debtor that he would

¹ [EDITOR'S NOTE. Thus if a debtor convey property to his creditor, as security for a debt *already* existing, the mere existence of this antecedent debt is not regarded as a valuable consideration which will support the conveyance against creditors or against subsequent purchasers for value. The deed is merely a "voluntary" one unless there be also "an agreement to give time, or else an actual forbearance which *ex postfacto* may become the consideration"; *Wigan v. English A.A.* (L.R. [1909] 1 Ch. at p. 303).]

give such security, and that, although it might take some time to get the warrants, he would hand them over to the creditor when he obtained them.

It appears to me, that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did in effect give, and the defendant received, the benefit of some degrees of forbearance; not indeed for any definite time, but at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action. But the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement¹.

Demurrer overruled.

CALLISHER v. BISCHOFFSHEIM.

QUEEN'S BENCH. 1870.

L.R. 5 Q.B. 449.

[*Forbearance to sue—Compromise—Demurrer.*]

DECLARATION, that the plaintiff had alleged that certain moneys were owing to him from the Government of Honduras, and from Don Carlos Gattierez, and others; and had threatened to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, Honduras Railway Loan Bonds for sums to the amount of 600*l.*, immediately the bonds should be printed. Averment, that the plaintiff did not take any proceedings during the agreed period, or at all; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach, that the defendant had not delivered to the plaintiff the bonds, or any of them.

Plea, that at the time of making the alleged agreement no moneys were due and owing to the plaintiff from the government and other persons.

Demurrer and joinder.

* * * * *

¹ [EDITOR'S NOTE. "It is not necessary that there should be an arrangement for forbearance for any definite time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a *reasonable* time was in fact extended." (*Per* Lord Macnaghten; L.R. [1903] A.C. at p. 313.)]

Pollock, Q.C. for defendant. Forbearance to prosecute a groundless action affords no consideration capable of supporting a promise. It is admitted on the record that no money was due to the plaintiff from the Honduras Government, and if the declaration and plea are read together, it is clear that a cause of action does not exist. All the cases are consistent with this view except *Cook v. Wright* (1 B. & S. 559); and that case is distinguishable. There the question was not whether a sum of money was due to the plaintiff, but whether it was due from the defendant or another person; whereas here the question, before the contract declared on was made, was whether a sum of money was due to the plaintiff from the Honduras Government. In *Wade v. Simeon* (2 C.B. 548) it was held that forbearance to prosecute a groundless claim gave no benefit to the promisor, and imposed no detriment on the promisee.

COCKBURN, C.J. Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue. But this does not vitiate the contract and destroy the validity of what is alleged as the consideration. If an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it. And if he bonâ fide believes he has a fair chance of success, he has a reasonable ground for suing; and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it.

It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action. [*See Wade v. Simeon.*]

BLACKBURN, J....The plea alleges that at the time of making the agreement no money was due. If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding; and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by *Cook v. Wright*. In that case the defendant knew that the original claim of the plaintiff was invalid; yet he was held liable, as the plaintiff believed his claim to be good. The Court say that "the real consideration depends on the reality of the claim made, and the bonâ fides of the compromise." If the plaintiff's claim against the Honduras Government was not bonâ fide, this ought to have been alleged in the plea; but no such allegation appears.

Judgment for plaintiff.

[NOTE BY THE LATE EDITORS. The judgment of Cotton, L.J., in *Miles v. N.Z. Alford Estates Co.* (32 Ch. Div. 266), contains, at p. 283, the following observations: "Lord Esher in *Ex parte Banner* (L.R., 17 Ch. D. 480) said that if the question ever came before this Court the authority of *Callisher v. Bischoffsheim*, *Ockford v. Barelli* (20 W.R. 116) and *Cook v. Wright* would have to be considered. Now, what I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good consideration for a contract.... And I think also that the mere fact of an action being brought is not material except as evidence that the claim was in fact made. A claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts (to his knowledge unknown to the other party) which shew that his claim is a bad one. Of course, if both parties know all the facts, and with knowledge of those facts obtain a compromise, it cannot be said that that is dishonest. That is, I think, the correct law, and it is in accordance with what is laid down in *Cook v. Wright* and *Callisher v. Bischoffsheim* and *Ockford v. Barelli*. The doubt of Lord Esher seems to have been whether a compromise would not be bad, or a promise to abandon a claim would be a good consideration, if, on the facts being elicited and brought out, and on the decision of the Court being obtained, it was found that the claim which was considered the consideration for the compromise was a bad one. But if the validity of a compromise is to depend upon whether the claim was a good one or not, no compromise would be effectual. Because if it was afterward disputed, it would be necessary to go into the question whether the claim was in fact a good one or not. I consider, notwithstanding the doubt expressed, that the doctrine laid down in *Cook v. Wright* and *Callisher v. Bischoffsheim* and *Ockford v. Barelli* is the law of this Court."]

LEASK v. SCOTT BROTHERS.

QUEEN'S BENCH. 1877.

L.R. 2 Q.B.D. 376.

[Cover of actual and further advances—Stoppage in transitu.]

INTERPLEADER action to try the right of the plaintiff as against the defendants to 100 bags of nuts:

Geen, Stutchbury, & Co., fruit merchants in London, agreed to purchase of the defendants a shipment of nuts from Naples to London by the *Trinidad*, "reimbursement as usual," which was by acceptance at three months on delivery of the shipping documents. On January 1st, 1876, being prompt day, Geen & Co., being already indebted to the plaintiff, their fruit broker, in between 10,000*l.* and 11,000*l.*, Mr Geen applied to him for a further advance of 2000*l.* The plaintiff said, "You may have it, but you must first cover up your account." Geen said that he would give him cover, and the plaintiff's cashier at once handed to Geen a cheque for 2000*l.* On January 4th, the bill of lading, dated the 29th of December, 1875, indorsed by defendants in blank (the nuts being made deliverable to their order), was handed by their agent to Geen & Co., and they at once accepted a draft for the price, 224*l.* 16*s.* 2*d.*; and on the next day Geen & Co. handed to the plaintiff the bill of lading and other similar documents to the value of about 5000*l.* in performance of their promise on the Saturday to give the plaintiff cover. On January 8th, Geen & Co. stopped payment. The *Trinidad* arrived off Liverpool on the 3rd of February, and the defendants sought to stop the nuts in transitu, the plaintiff claiming them under the bill of lading. The nuts were landed, warehoused, and sold; the price being held to abide the result of this interpleader action.

The jury found, that the plaintiff received the bill of lading honestly and fairly; and that valuable consideration was given on the understanding of security being given; and that the security given was to secure the 2000*l.*, and also the old account.

FIELD, J., directed judgment to be entered for the defendants; being of opinion that the facts of the case brought it within *Rodger v. Comptoir d'Escompte de Paris* (L.R. 2 P.C. 393), affirmed by *Chartered Bank of India, &c. v. Henderson* (L.R. 5 P.C. 501).

* * * * *

The judgment of the Court (Lord Coleridge, C.J., and Bramwell and Brett, L.JJ.), was delivered by

BRAMWELL, L.J....The plaintiff contended that he was a bonâ fide holder of the bill of lading for valuable consideration by transfer from the former lawful proprietor thereof and of the goods mentioned in it. This was not denied by the defendants. Their contention was that, though the plaintiff was such holder effectually as against Geen & Co. or any one claiming through or against them (except the defendants), yet the defendants had not lost their right to stop in transitu. That the right of stoppage in transitu is available and effectual against every one, except the assignee of a bill of lading for valuable consideration, and unless that valuable consideration had been got by means of the bill of lading. That, if the consideration were past, it was not such a consideration, and the title gained by it was not such a title, as would defeat the equitable right of stoppage in transitu. That such right was only defeated where there was a transfer for present consideration. That it was so in such case, because the consignor, or stopper in transitu, had by parting with the bill of lading enabled the consignee to get valuable consideration by means of it; and so had indirectly caused the giving of the consideration by the assignee of the bill of lading; but that that was not so where the consideration was past. There the giver of the valuable consideration was not prejudiced by means of the bill of lading, and consequently there was no reason why the equitable right of stoppage in transitu should be lost.

Mr Webster, for the defendants, at first put it that the equitable right of the consignor should prevail against the equitable right of the transferee of the bill of lading. But, on it being pointed out to him that the title of the transferee was legal, he altered his argument to what is above mentioned, viz., that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration no part of which was caused to be given by the bill of lading. The distinction of the two propositions is material.

In support of his argument Mr Webster cited *Rodger v. Comptoir d'Escompte de Paris* before the Judicial Committee of the Privy Council. We think that that case justifies his argument, and is in point; the ratio decidendi was clearly that advanced for the defendants in the present case. We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But we cannot. There is not a trace

of such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way; but wherever the rule is laid down it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a bonâ fide transferee defeats the right of stoppage in transitu....Then not only is the case a novelty but it is a novelty opposed to (what may be called) the silent authority of all the previous judges and writers who have dealt with the subject. Still further, the reason given in the judgment is not satisfactory. It is said (p. 405), "The general rule, so clearly stated and explained by Lord St Leonards in the case of *Mangles v. Dixon* (3 H.L.C. 702), is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it." No doubt. But that rule does not apply here. Lord St Leonards said that, in reference to a case where the title was to a chose in action, an equitable title only (or, dropping such an expression, a right against a person liable on a contract), and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is (as it was in *Rodger's Case*) a title to property in ownership; and, to use the old expression, a legal right.

If we look at the reason of the thing, we are led to the same conclusion. All the arguments used by Mr Justice Buller, in *Lickbarrow v. Mason* (2 T.R. 63), apply to such a case as the one before us. Practically such a past consideration as is now under discussion has always a present operation. It stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. It is necessary there should be a formal agreement in lieu of that which (whether it would support legal proceedings or not) was, no doubt, such an understanding that, if the plaintiff had taken proceedings against Geen & Co. the day after he had received the security, he would have committed a breach of faith. If in this case the plaintiff had bought the goods out and out and been paid part of his debt with the price, the consideration would have sufficed (if the transaction was not colourable). If the plaintiff had said, "I cannot take this bill of lading safely, as the consideration would be past; do it with the broker next-door and give me his cheque," that would have been valid. Is it desirable to introduce such niceties into commercial law? Moreover, there really always is a present consideration. It is not necessary to consider whether specific performance would be decreed as to this document which was not specified to the plaintiff; but the case of *Alliance Bank v. Broom* (*supra*, p. 134) shews that a general performance would be decreed, and certainly an action would lie for not covering. Therefore the assignor, for such consideration as this, always gets the benefit of performing his contract, and so saving himself from a cause of action. If Geen & Co., in this particular case, had said that this bill of lading was coming forward, and they would hand it to the plaintiff, then value would have been obtained by means of the bill of lading. So if they had said, generally, that they had securities coming forward and would deposit them. And what is the difference between a promise with such a statement and a promise without it?

In the analogous cases of goods obtained under a fraudulent contract, where the vendor loses his title if there is a transfer for value, there is no authority to shew that a past value is not sufficient.

Judgment for plaintiff.

TWEDDLE v. ATKINSON, EXECUTOR OF GUY DECEASED.

QUEEN'S BENCH. 1861.

I BEST & SMITH, 393.

[Agreement—Consideration—Near relationship.]

THE declaration stated that the plaintiff was the son of John Tweddle, deceased, and before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and, before the said marriage of the plaintiff, Guy, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed; and before the said marriage the said John Tweddle, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage the said William Guy and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said William Guy also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, for his said daughter, and acting for the benefit of his said daughter; and the said John Tweddle also entering into the said agreement in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said William Guy, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff; they the said William Guy and John Tweddle made and entered into an agreement in writing in the words following, that is to say:—"It is mutually agreed that the said William Guy shall and will pay the sum of 200*l.* to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of 100*l.* to the said William Tweddle, each and severally the said sums on or before the 21st day of August, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified."

And the plaintiff says that afterwards and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the William Tweddle therein mentioned. And the plaintiff says that the said 21st day of August, A.D. 1855, elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of 200*l.* paid by the said William Guy or his executor: yet neither the said William Guy nor his executor has paid the same.

Demurrer and joinder therein.

Mellish, for the plaintiff. Admitting the general rule that an action for breach of contract must be brought by the person from whom the consideration moved; there is an exception in the case of contracts made by parents for the purpose of providing for their children. In *Dutton v. Poole* (2 Lev. 210), affirmed in the Exchequer Chamber (T. Raym. 302), a tenant in fee simple being about to cut down timber to raise a portion for his daughter, the defendant his heir-at-law, in consideration of his forbearing to fell it, promised the father to pay a sum of money to the daughter, and an action of assumpsit by the daughter and her husband was held to be well brought.

[WIGHTMAN, J. In that case the promise was made before marriage. In this case the promise is post nuptial, and the whole consideration on both sides is between the two fathers.]

The natural relationship between the father and the son constituted the father an agent for the son, in whose behalf and for whose benefit the contract was made, and therefore the latter may maintain an action upon it.

[CROMPTON, J. Is the son so far a party to the contract that he may be sued as well as sue upon it? Where a consideration is required there must be mutuality.]

The object of the contract, which was that the children should be provided for, will be accomplished if this action is maintainable: whereas if the right of action remains in the father it will be defeated, because the damages recovered in that action will be his assets.

[CROMPTON, J. Your argument will lead to this, that the son might bring an action against the father on the ground of natural love and affection.] In *Bourne v. Mason* (Ventris, 6), two cases are cited which support this action. In *Sprat v. Agar*, in the King's Bench, in 1658, one promised the father that, in consideration that he would give his daughter in marriage with his son, he would settle so much land; after the marriage the son brought an action, and it was held maintainable. The other was the case of a promise to a physician that if he did such a cure he would give such a sum of money to himself and another to his daughter, and it was resolved the daughter might bring assumpsit, "Which cases," says the report, "the Court agreed"; and the reason assigned as to the latter is, "the nearness of the relation gives the daughter the benefit of the consideration performed by her father." There is no modern case in which this question has been raised upon a contract between two fathers for the benefit of their children.

[WIGHTMAN, J. If the father of the plaintiff had paid the 100*l.* which he promised, might not he have sued the father of the plaintiff's wife on his express promise?]

According to the old cases he could not. When a father makes a contract for the benefit of his child, the law vests the contract in the child. In *Thomas's Case* (Styles, 461), the defendant promised to a father that in consideration that he would surrender a copyhold to the defendant, the defendant would give unto his two daughters 20*l.* a-piece; and in an action brought by one of the daughters for breach of that promise, it was held that the two had distinct interests, and so each might bring an action.

WIGHTMAN, J. Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

CROMPTON, J....The modern cases have, in effect, overruled the old decisions; they shew that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. By reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN, J. The earlier part of the declaration shews a contract which might be sued on, except for the enactment in sect. 4 of the Statute of Frauds. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children they can sue upon it. *Dutton v. Poole* was cited for this. We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which that case cannot be supported. The cases upon stat. 27 El. c. 4, which have decided that, by sect. 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by sect. 4, shew that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.

Judgment for defendant.

[EDITOR'S NOTE. The general rule is well illustrated by the instance of promoters of Companies. For "it does seem just, in general, that if a Company takes the benefit of the work by which its existence has been rendered possible, and voluntarily comes into existence on the terms that it shall be liable to pay for such work—a cause of action should be given. I can find, however, no legal principle upon which such an action can be maintained." (*Per* Lord Coleridge, L.C.J., in *Melhuo v. Porto Co.*, L.R., 9 C.P. at p. 505.) Because as the Company did not exist at the date of its Articles of Association, it could not contract by them, either expressly or impliedly; nor could it even ratify any contract contained in them. Otherwise every promoter of a company would be able to sue it for the expenses of the promoting.]

EASTWOOD v. KENYON.

QUEEN'S BENCH. 1840.

11 ADOLPHUS & ELLIS, 438.

[*Past benefit, not requested, not a Consideration.*]

[THE plaintiff was executor under the will of John Sutcliffe, who died intestate as to his real estate, leaving his infant daughter Sarah his heiress. During her minority, the plaintiff voluntarily spent £140 of

his own upon the maintenance and education of Sarah and the improvement of her property. To reimburse himself he borrowed £140 from a Mr Blackburn on a promissory note. Sarah, on coming of age, paid Blackburn a year's interest and promised the plaintiff to repay Blackburn the principal. She afterwards married the defendant; who similarly promised to plaintiff that he would repay Blackburn. But defendant failed to do so when requested.]

On the trial it was objected on the part of the defendant that the promise stated was a promise to pay the debt of another within the Statute of Frauds, and ought to have been in writing....The plaintiff had a verdict....

On a motion to enter a verdict for the defendant, and also to arrest judgment on the ground that the declaration shewed no consideration for the promise alleged:

Alexanders shewed cause against it. The promise is not within the Statute; which requires a writing only where the promise is "to answer for the debt, default or miscarriages of *another person*." Here there is no other person in default, but the promise is to pay the amount to the plaintiff.

[PATTESON, J. It is rather a promise to pay Blackburn.]

In substance it is a promise to pay the plaintiff what he is liable to pay Blackburn. No case has yet decided that a promise to pay the promisee's own debt to a third person is within the Statute, which evidently contemplates the debt or default of third persons....

Then, as to the consideration; it has been distinctly held, that a moral obligation will support an express promise. There must be something done by the plaintiff at the defendant's request, or an act done for the defendant's benefit must be ratified by an express promise to pay; in either case, an action will lie....In *Lee v. Muggeridge* (5 Taunt. 36), executors were held liable on a promise by the testatrix, after the decease of her husband, to pay a bond made by her when under coverture, on the express ground that she was morally bound to pay it. A stronger case of moral obligation can hardly arise than the present, where the plaintiff is admitted to have been for many years the faithful guardian and manager of the estate of the defendant, while she was under age, and where the defendant and his wife have received great pecuniary benefit from the plaintiff's acts.

Cresswell, *contra*. The case is within the words, as well as the spirit and mischief of the Statute. It is a promise to discharge the note. If the defendant had paid Blackburn, could it have been contended that the promise was to pay the plaintiff; and that the payment to Blackburn was no answer to an action by the plaintiff? This is in truth a promise to pay Blackburn the debt due to him from the plaintiff, and it is not the less within the Statute, because the promise is made to the plaintiff and not to Blackburn himself, for the Act does not say *to whom* the promise is to be made....

Then as to the consideration: Suppose *A* gives a parol guaranty to a tradesman to induce him to supply goods to another, can *A* be made liable on a subsequent parol promise? Such a construction would defeat the Statute; yet the case is in principle the same as the present, and the

moral obligation much stronger. A promise may be evidence of a precedent request, but has no efficacy in itself....The doctrine of moral obligation as a ground for a promise must be limited to those cases where the law would have given a clear right of action originally, if some legal impediment had not suspended or precluded the liability of the party. The ordinary instances are infancy¹, bankruptcy, and the Statute of Limitations.

LORD DENMAN, C.J....If the promise had been made to Blackburn, doubtless the Statute would have applied: it would then have been strictly a promise to answer for the debt of another. The argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the Statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the Statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which any attempt has been made to put that construction upon the Statute which is now sought to be established, and which we think not to be the true one.

The second point arose in arrest of judgment, namely, whether the declaration shewed a sufficient consideration for the promise....It was argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or Statute provision. Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Loyd v. Lee* (1 Str. 94); debts of bankrupts revived by subsequent promise after certificate; and similar cases. *Barnes v. Hedley* (2 Taunt. 184) decided that a promise to repay a sum of money with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. *Lee v. Muggeridge* (5 Taunt. 36) upheld an assumpsit by a widow that her executors should pay a bond given by her while a feme covert to secure money then advanced to a third person at her request. On the latter occasion the language of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the Judges of this Court in *Cooper v. Martin* (4 East 76), where a

¹ [EDITOR'S NOTE. But any ratification, after majority, of a debt barred by Infancy is now rendered void by s. 2 of the Infants Relief Act, 1874; even if there be a new consideration for it. And the ratification of a debt barred by Bankruptcy is now regarded as *nudum pactum* unless based on a new valuable consideration; *Jakeman v. Cook* (L.R. 4 Ex. Div. 26). The only one of these anomalous cases that is still recognised in our law is that of the Statute of Limitations; on it see *Re River Steamer Co.* (L.R. 6 Ch. 82).]

stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a court of equity would hold as to a stepfather's liability; and rather to have assumed the point before us....And undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessities furnished at his request; in regard to which the law raises an implied promise.... In *Littlefield v. Shee* (2 B. & Ad. 811), Lord Tenterden said, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee v. Muggeridge*.

The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge* spoke of Lord Mansfield as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter....The doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it. The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking then the promise of the defendant to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v. Hewson* (7 T.R. 348) shews that it would not have been sufficient). The declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money. If the subsequent assent of the defendant could have amounted to a *ratihabitio*, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shewn, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort; and then another point would have arisen upon the Statute of Frauds which did not arise as it was.

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England. *Lampleigh v. Braithwait* (Hob. 105, *et infra*) is the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart, C.J., lays down that "a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference"; a difference brought fully out by *Hunt v. Bate* (Dyer, 272), where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without request of the defendant, was held to be made without consideration; but a promise to pay 20*l.* to plaintiff, who had married defendant's cousin at defendant's special instance, was held binding.

The distinction is noted in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

Judgment arrested.

[EDITOR'S NOTE. Where a son lives with his father and works along with him, without any promise of remuneration, the law implies no such promise. Hence, if the father afterwards promise the son some reward for the labours by which the father has thus benefited, this promise will be void for want of consideration and will not turn the moral claim into a legal one.]

STILK v. MYRICK.

NISI PRIUS. 1809.

2 CAMPBELL 317.

[*Fresh Promise without further Consideration.*]

THIS was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the voyage, the plaintiff was to be paid at the rate of 5*l.* a month. The principal question in the cause was, whether he was entitled to a higher rate of wages. In the course of the voyage two of the seamen deserted; and the captain, having in vain attempted to supply their places at Cronstadt, entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them, if he could not procure two other hands at Gottenburgh. This was found impossible. The ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

Garrow, for the defendant. This agreement was contrary to public policy, and utterly void. In West India voyages, crews are often thinned greatly by death and desertion; and if a promise of advanced wages were valid, exorbitant claims would be set up on all such occasions. In *Harris*

v. *Watson* (Peake 72), Lord Kenyon held that no action would lie at the suit of a sailor on a promise of a captain to pay him extra wages, in consideration of his doing more than the ordinary share of duty in navigating the ship; and said that if such a promise could be enforced, sailors would in many cases suffer a ship to sink unless the captain would accede to any extravagant demand they might think proper to make.

The *Attorney-General*, *contra*, distinguished this case from *Harris v. Watson*, as the agreement here was made on shore, when there was no danger or pressing emergency, and when the captain could not be supposed to be under any constraint or apprehension. The mariners were not to be permitted on any sudden danger to force concessions from the captain;—but why should they be deprived of the compensation he voluntarily offers them, in perfect security, for their extra labour during the remainder of the voyage?

LORD ELLENBOROUGH. I think *Harris v. Watson* was rightly decided; but I doubt whether the ground of public policy¹, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different. Or, if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves; and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of 5*l.* a month.

Verdict accordingly.

HARTLEY v. PONSONBY.

QUEEN'S BENCH. 1857.

7 ELLIS & BLACKBURN, 872.

[*Added Detriment good consideration for New Promise.*]

THE defendant was captain of *The Mobile*; the plaintiff was a mariner in the ship. The mariners, by their articles, agreed to serve on board the ship “on a voyage from Liverpool to Port Philip, from thence (if required) to any ports and places in the Pacific Ocean, Indian or China Seas, or wherein freight may offer, with liberty to call at a port for orders,

¹ [EDITOR'S NOTE. Contrast the opposite view of public policy suggested by Crompton, J., in the next case.]

and until her return to a final port of discharge in the United Kingdom: or for a term not to exceed three years." The wages of the plaintiff were to be 3*l.* per month. The proper complement of men was thirty-six. The three years would expire in July 1855. The ship left Liverpool, and reached Port Philip in Australia on 9th October 1852. While she was at Port Philip, seventeen of the crew refused to work, and were sent to prison. Among the remaining nineteen, there were only four or five able seamen. The master proposed to sail for Bombay: and, to induce the remaining crew to take the ship to Bombay, he promised to pay to some of them a sum in addition to their wages: and he gave to the plaintiff a written promise "to pay, in Liverpool, to Robert Hartley the sum of forty pounds sterling, provided he assist in taking ship *Mobile* from this port to Bombay with a crew of nineteen hands."

A similar note was given to eight other seamen. Contradictory evidence was given as to what passed between the defendant and the seamen at the time of this agreement being made, and as to the facility of hiring fresh seamen at Port Philip. The ship set sail for Bombay. She encountered much rough weather on the voyage, in consequence of which, and of the shortness of hands, extraordinary labour fell upon the crew. At Bombay additional hands were taken on board. She sailed for Liverpool; and arrived there on 14th June, 1853. The owners and the master refused to pay the seamen more than the wages originally contracted for: and this action was brought against the master for the 40*l.* Evidence was given as to the unfitness of so small a crew as nineteen to navigate the ship.

Erle, J. put three questions to the jury. First: Whether the defendant made the agreement voluntarily; to which the jury answered that he did so, and not by coercion; and that this was for the best interests of the owners. Secondly: whether the defendant could, by reasonable exertions, obtain more hands at Port Philip: to which the jury answered that he could not have done so at a reasonable price. Thirdly: whether it was unreasonable or unsafe to proceed on the voyage to Bombay with so few hands: to which the jury answered that they considered it unreasonable for a vessel of 1045 tons to proceed on that voyage with only nineteen hands. His Lordship then directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant.

* * * * *

Knowles, for defendant. The agreement of the captain cannot be considered to have been voluntary. The jury have indeed found that it was, which may be true in a vague and popular sense of the word: but, legally speaking, the refusal of the crew to proceed was a compulsion. The case is like *Harris v. Carter* (3 E. & B. 559), where it was held that a seaman was not relieved from his duty, so as to enable him to make a fresh contract, by the desertion or discharge of some of the hands. Here no more appears than that the desertion imposed additional labour on those who remained. *Harris v. Watson* (Peake, 72) is an authority for the defendant; there the action was against the captain, as here. In *The Araminta* (1 Spinks, 224), upon some of the crew deserting in Australia, the captain proposed to the remaining crew that they should

take the ship on, she being then short-handed, for additional wages, to which they assented. It was held that such additional wages could not be contracted for; and that, if they were paid, they might be deducted from the wages due on the original contract.

LORD CAMPBELL, C.J. I think that this verdict should stand. The answer given by the jury to the third question imports to my mind that for the ship to go to sea with so few hands was dangerous to life. If so, it was not incumbent on the plaintiff to perform the work; and he was in the condition of a free man. There was therefore a consideration for the contract; and the captain made it without coercion. This is therefore a voluntary agreement upon sufficient consideration. In *The Araminta* Dr Lushington says: "I do not wish it to be inferred from anything I now say, that mariners, having completed the voyage outwards, are compellable to make the return voyage when the number of the crew is so small that risk of life may be incurred." In *Harris v. Carter* there was no such risk.

COLERIDGE, J....It may be that the plaintiff took advantage of his position to make a hard bargain; but there was no duress.

CROMPTON, J....As regards public policy, it would be very dangerous to lay down that, under all circumstances and at any risk of life, seamen are bound to proceed on a voyage. The jury have found in this case (and, I think, upon the evidence, correctly) that it was not reasonable to require the seamen to go on. Where, from a ship being short-handed, it would be unsafe for the seamen to go to sea, they become free to make any new contract that they like.

Rule discharged.

[EDITOR'S NOTE. Similarly in *Hanson v. Royden* (L.R. 3 C.P. 47), where a man, who had shipped merely as an ordinary sailor, was appointed during the voyage to be second mate and served as such until the vessel (after touching at several ports) returned home, he was held entitled to a mate's wages. "Employed in fresh duties and with higher responsibilities, he is entitled to be paid accordingly." Had he, however, only discharged the duties of mate for a short time, in some sudden and brief emergency, he would have been doing no more than his existing duty as an ordinary seaman bound him to do.]

PINNEL'S CASE.

COMMON PLEAS. 1602.

5 COKE, 117.

[*Payment of a part of a debt not Satisfaction.*]

PINNEL brought an action of debt on a bond against Cole of 16*l.* for payment of 8*l.* 10*s.* the 11th day of Nov. 1600. The defendant pleaded, that he at the instance of the plaintiff, before the said day, *scil.* 1 Octob. anno 44. *apud W. solvit querenti* 5*l.* 2*s.* 2*d.*, *quas quidem* 5*l.* 2*s.* 2*d.* the plaintiff accepted in full satisfaction of the 8*l.* 10*s.*

And it was resolved by the whole court, that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility can a lesser

sum be a satisfaction to the plaintiff for a greater sum¹. But the gift of a horse, hawk, or robe, &c. in satisfaction is good. For it shall be intended that a horse, hawk, or robe, &c. might be more beneficial to the plaintiff than the money, in respect of some circumstance; or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment can the acceptance of parcel be a satisfaction to the plaintiff. But in the case at bar it was resolved, that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it, before the day, would be more beneficial to him than the whole at the day; and the value of the satisfaction is not material. So if I am bound in 20*l.* to pay you 10*l.* at Westminster, and you request me to pay you 5*l.* at the day at York, and you will accept it in full satisfaction of the whole 10*l.*, it is a good satisfaction for the whole. For the expences to pay it at York is sufficient satisfaction. But in this case the plaintiff had judgment for the insufficient pleading; for he did not plead that he had paid the 5*l.* 2*s.* 2*d.* in full satisfaction (as by the law he ought) but pleaded the payment of part generally; and that the plaintiff accepted it in full satisfaction. And always the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it. And for this cause judgment was given for the plaintiff.

See, reader, 26 H. 6, Barre 37 [where] in debt on a bond of 10*l.* the defendant pleaded, that one F. was bound by the said deed with him, and each in the whole; and that the plaintiff had made an acquittance to F., bearing date before the obligation and delivered after, by which acquittance he did acknowledge himself to be paid 20*s.* in full satisfaction of the 10*l.* And it was adjudged a good bar; for if a man acknowledges himself to be satisfied by deed, it is a good bar, without anything received.

[EDITOR'S NOTE. The concluding words embody the doctrine, which Lord Selborne pronounced to be "neither unreasonable nor practically inconvenient" that even a gratuitous contract may be rendered legally binding, by being expressed in the solemn form of an instrument sealed and delivered.]

GODDARD AND SON *v.* O'BRIEN.

HIGH COURT. 1882.

9 Q.B.D. 37.

Accord and Satisfaction—Delivery of cheque.

CASE stated by the Judge of the Southwark County Court.

The action is brought to recover amongst other items, 25*l.* 7*s.* 9*d.*, balance of account for goods sold and delivered.

On the 16th of August, 1880, the defendant was indebted to the plaintiffs in the sum of 125*l.* 7*s.* 9*d.* for billiard-table slates sold and delivered by them to him. On that day a member of the plaintiffs' firm

¹ [EDITOR'S NOTE. But, although payment of part cannot be a *satisfaction* of the whole debt, "it may, under certain circumstances, be evidence of a *gift* of the remainder"; (*per* Parke, B., 15 M. & W. at p. 33).]

met the defendant and agreed to accept the sum of 100*l.* in discharge of the said sum of 125*l.* 7*s.* 9*d.* The defendant thereupon gave to the plaintiffs a cheque for 100*l.* payable on demand, and the plaintiffs gave him a receipt in the following form—"Received the sum of 100*l.* by cheque, which is to be in settlement of account of 125*l.* 7*s.* 9*d.*, on said cheque being honoured." The cheque was duly honoured. There was no consideration given by the defendant, or received by the plaintiffs, in satisfaction of the said sum of 125*l.* 7*s.* 9*d.*, other than the cheque for 100*l.*

Judgment was given for the defendant; the judge holding that the payment to and acceptance by the plaintiffs of the cheque for 100*l.* in settlement of their claim for 125*l.* 7*s.* 9*d.* was a good accord and satisfaction, by reason of the cheque being a negotiable security; although the payment of 100*l.* in cash would not have been a good accord and satisfaction.

The questions for the opinion of the Court were—first, whether the payment by the defendant to the plaintiffs of the cheque for 100*l.* in settlement of their debt of 125*l.* 7*s.* 9*d.* was a good accord and satisfaction of the whole of the plaintiffs' debt; secondly, whether the plaintiffs were entitled to judgment for the 25*l.* 7*s.* 9*d.*

Brown, for the plaintiffs. This case falls within the rule laid down by Pratt, C.J., in *Cumber v. Wane* (Str. 426), that a debt is not satisfied by the receipt of a security of equal degree for a smaller sum. The cheque here was not a negotiable instrument, nor was it received as such; it was accepted as cash conditionally on its being duly honoured, as appears from the form of the receipt. The reason for the distinction between a payment in cash and a payment by a negotiable security is clearly stated by Alderson, B., in *Sibree v. Tripp* (15 M. & W. 23): "It is undoubtedly true that payment of a portion of a liquidated demand in the same manner as the whole liquidated demand ought to be paid is *payment* only in part, because it is not one bargain, but two, viz. payment in part and an agreement, without consideration, to give up the residue. But if, for money, you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value."...

[HUDDLESTON, B. *Sibree v. Tripp*, if it does not overrule, is entirely inconsistent with *Cumber v. Wane*.]

This case is quite beside *Sibree v. Tripp*. There, there was a distinct consideration for the accord besides the giving of the new promissory notes and the acceptance of them by the defendant, viz. the putting an end to litigation between the parties. Here, it was the money and not the cheque that was accepted in satisfaction. It was a conditional payment; and there was no consideration for the abandonment of the excess. The ruling was therefore wrong.

GROVE, J....*Sibree v. Tripp* was a just and proper decision, and must govern this case. It is said that part of the consideration there was the putting an end to litigation between the parties. Non constat that there was not a stoppage of litigation here. It is further said that the acceptance of the cheque here was conditional only. Possibly that might make the consideration of less value....The decision of the county court judge was right.

HUDDLESTON, B.... There was a good accord and satisfaction by reason of the cheque being a negotiable security. The rule cannot be better stated than it is in Smith's Leading Cases: "The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows, viz. that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement."

Judgment for defendant.

FOAKES v. BEER.

HOUSE OF LORDS. 1884.

L.R. 9 APP. CA. 605.

[Contract by Creditor to take less than sum due.]

APPEAL from an order of the Court of Appeal (L.R. 11 Q.B.D. 221).

Beer, the respondent, had recovered a judgment against the appellant Foakes. A memorandum of agreement was made and signed by the appellant and respondent on Dec. 21st, 1876, in the following terms:

"Whereas the said J. W. Foakes is indebted to the said Julia Beer, and she has obtained a judgment for the sum of £2090. 19s. And whereas the said J. W. Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that in consideration of the said J. W. Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500,...in part satisfaction of the said judgment debt of £2090. 19s., and on condition of his paying to her or her executors, administrators, assigns or nominee, the sum of £150 on the 1st day of July and the 1st day of January...in every year until the whole of the said sum of £2090. 19s. shall have been fully paid and satisfied (the first of such payments to be made on the 1st day of July next), then she the said Julia Beer hereby undertakes and agrees that she...will not take any proceedings whatever on the said judgment."

The respondent having in June 1882 taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent as plaintiff and the appellant as defendant whether any and what amount was on the 1st of July, 1882, due upon the judgment.

At the trial of the issue before Cave, J., it was proved that the whole sum of £2090. 19s. had been paid by instalments, but the respondent claimed interest. The jury under his Lordship's direction found that the appellant had paid all the sums which by the agreement of the 21st of December, 1876, he undertook to pay and within the times therein specified. Cave, J., was of opinion that whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Court of Appeal entered judgment for the respondent for the interest due, with costs.

Holl, Q.C., for appellant. Apart from the doctrine of *Cumber v. Wane* there is no reason in sense or law why the agreement should not be valid; and the creditor prevented from enforcing his judgment, if the agreement be performed. It may often be much more advantageous to the creditor to obtain immediate payment of part of his debt than to wait to enforce payment, or perhaps by pressing his debtor to force him into bankruptcy with the result of only a small dividend. Moreover if a composition is accepted friends, who would not otherwise do so, may be willing to come forward to assist the debtor. And if the creditor thinks that the acceptance of part is for his benefit who is to say it is not? The doctrine of *Cumber v. Wane* has been continually assailed, as in *Couldery v. Bartrum* by Jessel, M.R.¹... *Cumber v. Wane* was decided on a ground now admitted to be erroneous, viz. that the satisfaction must be found by the Court to be reasonable. The Court cannot inquire into the adequacy of consideration. *Pinnel's Case* (*supra*, p. 150) was decided on a point of pleading; the dictum that payment of a smaller sum was no satisfaction of a larger, was extrajudicial, and overlooked all considerations of mercantile convenience; and it is also noticeable that it was a case of a bond debt sought to be set aside by a parol agreement. It is every day practice for tradesmen to take less in satisfaction of a larger sum, and

¹ 19 Ch. D. 399. [He there said: "According to English common law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction. But, by a most extraordinary peculiarity of the English common law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary together with his 19s. 6d. there was no accord and satisfaction; if he did, there was accord and satisfaction.... But, that being so, there came a class of arrangements between creditors and debtors, by which a debtor who was unable to pay in full offered a composition of something less in the pound. Well, it was felt to be a very absurd thing that the creditors could not bind themselves to take less than the amount of their debts. There might be friends of the debtor who would come forward and pay something towards the debts; or it might be that the debtor was in such a position that, if the creditors took less than their debts, he would have something over for himself and would exert himself to pay the dividend; whereas, if the creditors did not, they would get nothing—or less than nothing if they incurred costs in endeavouring to get payment. Therefore it was necessary to bind the creditors; and, as every debtor had not a stock of canary-birds or tomtits, or rubbish of that kind, to add to his dividend, it was felt desirable to bind the creditors in a sensible way by saying that, if they all agreed, there should be a consideration imported from the agreement, constituting an addition to the dividend; so as to make the agreement no longer *nudum pactum*, but an agreement made for valuable consideration; then there would be satisfaction. Consequently, if the creditors came in and all agreed *inter se* to take 10s. in the pound, the agreement *inter se* supplied the additional consideration which was supposed to be necessary, and the debts were satisfied—so satisfied, that, if one of the creditors obtained an unfair advantage, a Court of Equity actually interfered, and allowed the debtor to recover back the surplus from him, because he was not entitled to take from the debtor anything more than the composition.... His debt was satisfied, and he had no right to take an unfair advantage." As to such compositions, see *Good v. Cheesman*, *infra*, p. 158.]

give discount, where there is neither custom nor right to take credit.... The agreement to pay the respondent's nominee is good consideration. A cheque is sufficient consideration; *Goddard v. O'Brien* (*supra*, p. 151). It has often been held that a sheet of paper or a stick of wax is a sufficient consideration. The result of the cases is that if *Cumber v. Wane* be right, payment of a less sum than the debt due, by a bill, promissory note or cheque is a good discharge; but payment of such less sum by sovereigns or Bank of England notes is not. Here the agreement is not to take less than the debt, but to give time for payment of the whole without interest. Mankind have never acted on the doctrine of *Cumber v. Wane*, but the contrary; nay few are aware of it. By overruling it the House will only declare the universal practice to be good law as well as good sense....

EARL OF SELBORNE, L.C. Upon the construction of the agreement I cannot differ from the conclusion in which both the Courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment of any portion of the amount recoverable (whether for principal or for interest) under the judgment. But the agreement of the judgment creditor, which follows the recitals, is that she "will not take any proceedings whatever on the judgment," if a certain condition is fulfilled. What is that condition? Payment of the sum of £150 in every half year, "until the whole of the said sum of £2090. 19s. shall have been fully paid and satisfied." A particular sum is here mentioned, which does not include the interest then due, or future interest. Whatever was meant to be payable at all, under this agreement, was clearly to be payable by half-yearly instalments of £150 each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of £2090. 19s., "and interest thereon," should have been fully paid and satisfied, would be to introduce very important words into the agreement, which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I very much doubt whether the effect of the agreement, as a conditional waiver of the interest, was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

But the question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant; or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed, except a present payment of £500, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of £150 each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise *de futuro* was only that of the respondent, that if the half-yearly payments of £150 each

were regularly paid, she would "take no proceedings whatever on the judgment." No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment unless the payment of the £500, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction *ad interim*, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine laid down by all the judges of the Common Pleas in *Pinnel's Case* (*supra*) in 1602, but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account, to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor, agreed to, *inter se*, by several creditors. (I prefer so to state the question instead of treating it, as it was put at the Bar, as depending on the authority of the case of *Cumber v. Wane*.) The doctrine itself, as laid down by Coke, may have been criticised by some persons whose opinions are entitled to respect, but it has never been judicially overruled. On the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years....

I think it would be an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be generally binding, though not under seal. Nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal. But I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. What is called "any benefit or even any legal possibility of benefit," in Smith's Leading Cases, is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent; but is some independent benefit, actual or contingent, of a kind which

might in law be a good and valuable consideration for any other sort of agreement not under seal.

[The other judgments are omitted.]

Appeal dismissed.

BIDDER v. BRIDGES.

CHANCERY. 1883.

37 CH. DIV. 406.

[*Accord and Satisfaction—Cheque of third party for smaller sum.*]

COTTON, L.J. This is an appeal from a decision of Mr Justice Stirling, who refused the application now brought before us again on appeal. The application is that a gentleman, to whom the appellant has delivered up certificates of the Taxing Master, should be ordered to produce them in order that the appellant may make them effectual against the plaintiffs in the action, in order to get interest on his costs. There was an order made for the plaintiffs to pay the costs. There were two certificates of the Master, one for the costs in the Court below, the other for the costs in the Court of Appeal. When the certificates were obtained, but before they were filed, the solicitor acting for the plaintiffs wrote to the solicitor of the defendant, asking him not to incur the expense of filing the certificates. However, the defendant's solicitor called on him, and then the plaintiffs' solicitor paid him with his own cheque the amount of each of the certificates, less 10s. It is said by the defendant that that 10s. was taken off in order to remove the item for filing the certificate. Whether that is so or not is immaterial. The sum was taken off; and, on the cheque being handed over by the plaintiffs' solicitor, the defendant's solicitor handed over to the plaintiffs' solicitor those two certificates with receipts indorsed on them.

Now what we have to consider is this, What was the agreement entered into on that occasion? and, secondly, Was there any consideration for it? Now, in my opinion, the agreement is clear. It is very true that the indorsement upon the certificates is in this form: "Received by cheque the within mentioned costs, £609. 5s. 2d., less 10s. remitted"; the amount, of course, being different on the two certificates. What was the meaning of that? The meaning was that the defendant's solicitor should give up all his claim (whatever it was) under those certificates, on receiving from the plaintiff's solicitor the cheque for the amount mentioned in the two certificates. It is said he never intended to give up any interest. I quite believe he did not know anything about interest then, or think that he was entitled to it. But if, in fact, he was entitled to interest on these certificates at the date of the judgment, and gave up all his claim under the certificates, then, in my opinion, he gave up, if there was good consideration, all those matters which he could, without anything further, obtain on those certificates, even though he did not know the law which would give him interest¹. Of course ignorance of general law will not excuse any man when he enters into an agreement.

[EDITOR'S NOTE. By the Judgments Act 1838, s. 17, judgments (except those of the County Courts) carry interest at four per cent., from the date of their being entered up, until they are satisfied.]

But it is said that our decision to that effect would be a contradiction of *Foakes v. Beer* (*supra*, p. 153). All that Earl Selborne decided there (and none of the other Lords who delivered opinions differed from it) was that, looking at the words of the agreement, one could only take it as an agreement to receive the sum of money and the instalments therein mentioned, in consideration of the principal sum which was due, and nothing more; and that to give it a different construction would be to add to that written agreement, which apparently fully expressed the intention of the parties, words which were not there, namely, "interest on those sums." That is an entirely different matter. What is the agreement between the parties as shewn by their acts? In my opinion the agreement was here to give up all claim in respect to the matters mentioned in the certificates, that is, in respect of those certificates.

Was there a consideration?...The payment of a smaller sum cannot be a good consideration for accord and satisfaction of a claim for a larger one. Yet if there is anything which can be a new benefit to the person entitled to the larger sum, that will do. The only thing we have to consider is whether in this case there was anything which could be some new and different benefit to the person entitled to the larger sum. Even if it is a promissory note signed by the person who is liable for the larger sum, that will do. But here the solicitor himself gives *his* cheque for this amount. It is very true he was paying it on behalf of his client; but not paying it so as to make his act in signing that cheque the act of his client. He gave the cheque and became personally responsible for it; (though, undoubtedly, he had a right of indemnity as against his client). That being so, we are justified in holding, not inconsistently with *Foakes v. Beer*, that there was sufficient consideration to support the contract.

* * * * *

LOPES, L.J....The giving of a negotiable instrument for a smaller sum by a third party would support accord and satisfaction....I think that the certificates were given up, and the cheque taken, upon an understanding that all other claim was relinquished. We must look at the intention of the parties at the time. According to my view, that was their then intention. In point of fact, they neither of them thought of the interest; and they intended at that time that what was then done should put an end to all the claims arising from that judgment. Since that, a case has been decided which has brought to the attention of the applicant here that he might have claimed interest on his costs. But he cannot now turn round and make that claim.

Appeal dismissed.

GOOD v. CHEESMAN.

KING'S BENCH. 1831.

2 BARNEWALL & ADOLPHUS, 328.

[*Forbearance of creditors by mutual agreement.*]

ASSUMPSIT by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial it was proved, on behalf of the defendant, that after the bills became due, and

before the commencement of this action, the plaintiff and three other creditors of the defendant met together, in consequence of a communication from him, and signed the following memorandum: "Whereas William Cheesman is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting to pay to a trustee of our nomination one third of his annual income, and executing a warrant of attorney¹ as a collateral security until payment thereof." It did not appear whether or not the defendant was present when this paper was signed, nor did he ever sign it; but it was in his possession at the time of the trial, and he had procured it to be stamped. At the time of the signature, the defendant had other creditors than the four above mentioned, and particularly one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up; and it was agreed, at the meeting, that if Gloge would come into the arrangement there made, an additional 20*l.* per annum should be set apart by the defendant out of his income. The defendant wrote to the plaintiff as follows: "If you should see Mr Wooldridge" (one of the creditors who signed) "to-day, I should be glad if you would endeavour to be at my house any noon that you may be down, as there is an objection to the arrangement by Mr Gloge, the particulars of which I will explain when I see you." Gloge never acceded to the agreement, nor was any trustee ever nominated, or covenant entered into, or warrant of attorney executed, as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. Lord Tenterden, C.J., left it to the jury, as the only question of fact in the case, whether the agreement entered into by the four creditors was conditional only, depending on Gloge's assent, or absolute. In the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for the defendant. Leave was given to move to enter a verdict for the plaintiff. A rule nisi having been obtained accordingly....

Follett, for plaintiff. The main answer to the defence is, that the accord, if any, was without satisfaction, and the defendant was never released. The agreement of the four creditors was altogether executory, and nothing was done upon it: there is no ground, therefore, for arguing, as in some cases, that the plaintiff has induced others to join him in an *act*, from the consequence of which he now seeks to relieve himself individually. None of the creditors were bound unless the agreement was carried into effect. When accord and satisfaction are pleaded, it is quite usual to traverse the averment of acceptance; and this is a complete answer to the plea. Here no acceptance had, in fact, taken place before the action was brought; the creditors, therefore, were not bound; and while a bargain is in fieri any party may retract, if he has not as yet altered the situation of third persons. Where third parties are not affected, a creditor, agreeing by parol to take a less sum than his entire debt, is not

[EDITOR'S NOTE. *I.e.* an instrument (formerly in frequent use but now very rare) by which a debtor gives authority (usually only conditional, not absolute) to a solicitor to appear for him in an action brought against him by the creditor, and permit judgment to be entered against him.]

thereby precluded from afterwards suing for the whole. In *Heathcote v. Crookshanks* (2 T.R. 24) it was held that such an agreement among the creditors, not having been followed by actual acceptance, was not obligatory. [PARKE, J. It did not appear by the pleadings in that case that the creditors agreed to forbear. Here it may be inferred that they did.]

Still it was a question discussed by the Court, whether an agreement to forbear, under such circumstances, was binding; and they thought it was not....The non-completion of the agreement was the fault of the defendant; for, according to *Cranley v. Hillary* (2 M. & S. 120), the person to be discharged is bound to do the act which is to discharge him, and not the other party. It was his business to seek out the creditors, procure the nomination of a trustee, and tender the necessary securities. If the defendant, instead of the general issue, had pleaded accord and satisfaction, it would not have been sufficient to shew a parol agreement by the plaintiff and other creditors to receive less than their demands; the defendant must have averred an execution by himself of an assignment or something tantamount, in fulfilment of his part of the accord, and an acceptance by them. For "every accord ought to be full, perfect, and complete"; and "if the thing be to be performed at a day to come, tender and refusal is not sufficient without actual satisfaction and acceptance" (*Peytoe's Case*, 9 Rep. 79 b).

LORD TENTERDEN, C.J. On the evidence it must be taken that the defendant assented to the composition, and would have been willing to assign a third of his income to a trustee nominated by the creditors, and execute a warrant of attorney, as required by the agreement; but he could not do so unless the creditors would appoint a trustee to whom such assignment could be made, or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that this was not an accord and satisfaction properly and strictly so called; but it was a consent, by the parties signing the agreement, to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit. Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action, where others have been induced to join him in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims.

LITTLEDALE, J....It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney. If it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always

ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from *Heathcote v. Crookshanks*. And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand under a persuasion that none of the parties to the memorandum would proceed against the defendant.

PATTESON, J. The agreement was entered into by the plaintiff on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on the faith of a forbearance by all to the debtor.

Rule discharged.

[EDITOR'S NOTE. "A rather artificial consideration"; Lord Fitzgerald (L.R. 9 App. Ca. 630).]

SCOTSON AND OTHERS v. PEGG.

EXCHEQUER. 1861.

6 HURLSTONE & NORMAN, 295.

[Promise to A to do what promisor had already promised B to do.]

DECLARATION.—For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of the plaintiffs, the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload the same at the rate of forty-nine tons during each working day, after the said ship was ready to unload the same. And although the plaintiffs did afterwards deliver the said cargo to the defendant, and were always ready and willing to permit him to take the same out of the said ship as aforesaid, and although all conditions precedent to be performed by the plaintiffs were performed by the plaintiffs, to entitle the plaintiffs to a performance of the said promise by the defendant: Yet the defendant did not unload the said cargo at the rate aforesaid during each working day after the said ship was ready to unload the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise; and the plaintiffs were put to expense.

Plea.—That before the making of the said promise the plaintiffs, by another contract made between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons; which contract was in full force thence, until and at the time of the making of the said promise and the delivery of said coals. And the defendant says that before the making of the said promise, and after the making the said other contract, and while the last-mentioned contract was in force, he bought the coals of the said other persons, who thereupon ordered the plaintiffs to deliver the same to the defendant, according to the said contract with the said other persons, of which the plaintiffs, before the making of the said promise,

had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then future delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract with such other persons so agreed to make as aforesaid, and which before and at the time of the making of the said promise, until and at the time of the said delivery, the plaintiffs were, according to the said contract with the said other persons, bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons they the plaintiffs, before and at the time of the making of the said promise, and thence until the plaintiffs did it, were bound to do.

Demurrer and joinder therein.

C. Pollock, for defendant. There is no consideration to support the promise. The plea shews that the consideration alleged in the declaration is the doing that which the plaintiffs, by their contract with other persons, were bound to do....The cargo is the property of the defendant, and the agreement to deliver to him that which he was entitled to have was a *nudum pactum*, and therefore the promise to the defendant to do the same thing was void. Where a plaintiff discharged one of two joint debtors, it was held that a promise by a third person to pay the debt, in order to obtain the discharge of the other debtor, was void for want of consideration; *Herring v. Dorell* (8 Dowl. 604). So, if *A* be illegally arrested by *B* for a debt, a promise by *C* to pay the debt claimed by *B*, in consideration of *B*'s releasing *A* out of custody, is void: *Atkinson v. Settree* (Willes, 482).

[WILDE, B. In those cases there was a legal right to the performance of the very act which was bargained for: it is not so here.

MARTIN, B. Suppose a man promised to marry on a certain day, and before that day arrived he refused, on the ground that his income was not sufficient, whereupon the father of the intended wife said to him: "If you will marry my daughter, I will allow you a 1000*l.* a year." Could not that contract be enforced?]

There would be no consideration for such a promise, the party being already under an obligation to marry. A promise by a captain to pay his sailors increased wages for performing their duty during a storm is void for want of consideration.

[MARTIN, B. That proceeds on the ground of public policy.

WILDE, B. It often happens that when goods arrive in a ship, and there is a lien upon them, a merchant who wants to get possession of the goods promises to pay the lien if the master will deliver them to him. A man may be bound by his contract to do a particular thing, but while it is doubtful whether or no he will do it, if a third person steps in and says, "I will pay you if you will do it," the performance is a valid consideration for the payment.

MARTIN, B. If a builder was under a contract to finish a house on a particular day, and the owner promised to pay him a sum of money if he would do it, what is to prevent the builder from recovering the money?]

As the plaintiffs would be doing a wrong by not fulfilling their contract, it must be presumed that the prior legal obligation, and not the subsequent promise, was the motive for their delivery of the cargo.

MARTIN, B....It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage¹; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. Suppose the plaintiffs had no chance of getting their money from the other persons, who might perhaps have become bankrupt....

WILDE, B....To say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing.

Judgment for plaintiffs.

[EDITOR'S NOTE. In the previous year (1860) two judges of the Court of Common Pleas had held, against one dissentient, that an uncle's promise, to a nephew who had become engaged to marry, to pay him an annuity "as I promised to assist you at starting," was binding; although the betrothal had *not* taken place at the request of the uncle. (Had it, his promise would, of course, have been undoubtedly binding on him.) *Shadwell v. Shadwell* (9 C.B., N.S., 159). The student will do well to compare the different views of text-writers—e.g. Pollock, Leake, Chitty, Anson—on this difficult question. See also the *Harvard Law Review* of Dec. 1903.]

¹ [EDITOR'S NOTE. *I.e.*, compensation due to the owner of a vessel, from the shipper of cargo, for her detention in port beyond the date agreed upon in the contract of affreightment.]

NICHOLS v. RAYNBRED.

EXCHEQUER CHAMBER. 1613.

HOBART, 88.

[*Bilateral contract—Promise for Promise.*]

NICHOLS brought an assumpsit against Raynbred, declaring that, in consideration, that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50 shillings. Adjudged for the plaintiff in both¹ courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note: here the promises must be at one instant, or else they will both be *nuda pacta*.

SIDENHAM v. WORLINGTON.

COMMON PLEAS. 1585.

2 LEONARD, 224.

[*Consideration executed upon request—Subsequent Promise.*]

IN an action upon the case upon a promise, the plaintiff declared, That he at the request of the defendant, was surety and bail for J. S. who was arrested in the King's Bench, upon an action of 30*l.*; and that afterwards, for the default of J. S. he was constrained to pay the 30*l.* After which, the defendant meeting with the plaintiff, promised him, for the same consideration, that he would repay that 30*l.*; which he did not pay. Upon which the plaintiff brought the action; the defendant pleaded non assumpsit; upon which issue was joined, which was found for the plaintiff.

Walmesley, for the defendant, moved the Court, That this consideration will not maintain the action, because the consideration and promise did not concur and go together. For the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration. As if one giveth me a horse, and a month after, I promise him 10*l.* for the said horse, he shall never have debt for the 10*l.* nor assumpsit upon that promise; for there it is neither contract, nor consideration, because the same is executed.

ANDERSON, J. This action will not lie. For it is but a bare agreement and *nudum pactum*; because the contract was determined, and not in esse at the time of the promise. But he said it is otherwise upon a consideration of marriage of one of his cousins; for marriage is always a present consideration.

WINDHAM, J., agreed with Anderson, and he put the case (in 3 H. 7) that if one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant; for that such warranty ought to have been made or given at such time as the horse was sold.

PERIAM, J., conceived that the action did well lie. And he said that this case is not like unto the cases which have been put of the other side;

¹ [EDITOR'S NOTE. *I.e.* both the Court of Common Pleas and that of the Exchequer Chamber.]

for there is a great difference betwixt contracts and this case. For in contracts upon sale, the consideration and the promise and the sale ought to meet together....But to maintain an action upon an assumpsit, the same is not requisite; for it is sufficient, if there be a moving cause for which cause or consideration the promise was made....In *Hunt v. Baker* (Dyer, 272), the apprentice of one Hunt, was arrested when his master Hunt was in the country; and one Baker, one of the neighbours of Hunt, to keep the said apprentice out of prison, became his bail, and paid the debt. Afterwards Hunt, returning out of the country, thanked Baker for his neighbourly kindness and promised him that he would repay him the sum which he had paid for his apprentice. And afterwards, upon that promise, Baker brought an action upon the case against Hunt; and it was adjudged, that the action would not lie, because the consideration was precedent to the promise, because it was executed and determined long before. But it was holden by all the Justices that if Hunt had requested Baker to have been bail, and afterwards Hunt had made the promise for the same consideration, the same had been good; for that the consideration did precede, and was at the instance and request of the defendant.

RHODES, J., agreed with Periam; and he said that if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him 20*l.* for his good and faithfull service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration. But if a servant hath wages given him, and his master ex abundanti doth promise him 10*l.* more after his service ended, he shall not maintain an action for that 10*l.* upon the said promise; for there is not any new cause or consideration preceding the promise.

Which difference was agreed by all the Justices.

Judgment for plaintiff.

ENGLAND v. DAVIDSON.

QUEEN'S BENCH. 1840.

11 ADOLPHUS & ELLIS, 856.

[*Reward—Services rendered by constable.*]

ASSUMPSIT. The declaration that heretofore, to wit &c., the defendant caused to be published a certain hand bill, headed "Fifty pounds reward"; whereby (after reciting that, late on the night of &c., the mansion house of defendant, at &c., was feloniously entered by three men, who effected their escape; that two men had been taken into custody, and that a third, supposed to belong to the gang, had been traced to Carlisle, and was of the following description, &c.), the defendant did promise that whoever would give such information as should lead to the conviction of the offender or offenders should receive the above reward: that plaintiff, confiding &c., did afterwards, to wit on &c., give such information as led to the conviction of one of the said offenders, to wit one David Robson; and that afterwards D. R., who was guilty of the said offence, was convicted of the said offence, in consequence of such infor-

mation so given by plaintiff; of all which said several premises defendant afterwards had notice, and was then requested by plaintiff to pay him the said sum of 50*l.*; and defendant afterwards, in consideration of the premises, then promised plaintiff to pay him the sum of 50*l.* Breach, that, although defendant, in part performance of his said promise and undertaking, did pay to plaintiff the sum of 5*l.* 5*s.*, in part payment of the said sum of 50*l.*, yet &c. (breach, non-payment of the residue).

Third plea. That at the time when the house of defendant was so feloniously entered, and continually from thence hitherto, plaintiff was, and now is, a constable of the district where the said offence was committed; and it was then the duty of plaintiff, as such constable to give every information which might lead to the conviction of the said offender; and to apprehend him and prosecute him to conviction, if guilty, without any payment or reward to him made in that behalf: that, by the said advertisement, defendant promised that whoever would give such information to plaintiff, therein described as "police officer, Hexham," as should lead to the conviction of the offender, should receive the said reward and in no other manner whatever. And that, by reason of the premises, the said promise was and is void in law.

Demurrer.

Martin, for the defendant. No consideration is shewn on this record for the defendant's promise; the plaintiff was bound to do that, the doing of which is stated as the consideration. The duty of a constable is to do his utmost to discover, pursue, and apprehend felons. A sailor cannot recover on a promise by the master to pay him for extra work in navigating the ship, the sailor being bound to do his utmost, independently of any fresh contract; *Harris v. Watson*, explained by Lord Ellenborough in *Stilk v. Myrick* (*supra*, p. 147).

[COLERIDGE, J. Those cases turn merely on the nature of the contract made by the sailor.]

If the duty here incumbent on the plaintiff was to do all that the declaration lays as the consideration, the case is the same as if he had been under a previous contract to do all. The contract here declared upon is against public policy.

LORD DENMAN, C.J. I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear.

LITTLEDALE, PATTESON, and COLERIDGE, JJ., concurred.

Judgment for plaintiff.

[EDITOR'S NOTE. In *Bent v. Wakefield Bank* (L.R., 4 C.P.D. 1). Grove, J., said "All that *England v. Davidson* decides is that a constable, as such, is not necessarily disentitled to a reward of this description, as against public policy....There are strong arguments of expediency why constables should not be allowed to receive rewards. But...whatever my own opinion may be...that decision, if it is to be reviewed, must be reviewed in a Court of Appeal."]

ROSCORLA v. THOMAS.

QUEEN'S BENCH. 1842.

3 A. & E., N.S. 234.

[Warranty after contract made.]

ASSUMPSIT. The declaration stated that in consideration that plaintiff, at the request of defendant, *had* bought of defendant a certain horse, defendant promised plaintiff that the said horse did not exceed five years old, and was sound, and free from vice; nevertheless defendant did not regard his said promise, but thereby deceived plaintiff in this, to wit, that the said horse, at the time of the making of the said promise, was not free from vice, but, on the contrary thereof, was vicious, restive, ungovernable, and ferocious, whereby &c.

Pleas: 1. Non assumpsit. Issue thereon. 2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable or ferocious, in manner &c.: conclusion to the country. Issue thereon.

A verdict was found for the plaintiff on both the above issues. *Bompas, Serjt.*, obtained a rule nisi for arresting the judgment.

Erle, for plaintiff. An objection is that the first count states only a *nudum pactum*. But there is an executed consideration, which, with a request, will support a promise. Now the request need not be express: wherever the law will raise a promise, a request by the party promising will be implied. *Payne v. Wilson* (7 B. & C. 423) was the converse of the present case: there a consideration, which in its form was executed, was declared on as executory; and this was held to be no variance, because in reality the consideration was continuing. Here the declaration states an executed consideration in form; but it is, practically, executory, because the sale and warranty would be coincident. In *Thornton v. Jenyns* (1 M. & G. 166) the declaration charged that, in consideration that plaintiff *had promised* to defendant, defendant *then* promised plaintiff. It was objected that this was an executed consideration without a request, which was insufficient where the law would not raise a promise; and *Brown v. Crump* (1 Marsh. 567) was cited. But the Court held that the two promises might be considered as simultaneous, and that the objection therefore could not be sustained.

* * * * *

LORD DENMAN, C.J....It is objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule (subject to exceptions not applicable to this case) that the promise must be coextensive with the consideration. In the present case, the only promise that would result from the consideration as stated, and be coextensive with it, would be to deliver the horse upon request. The precedent sale without a warranty, though at the request of the defendant, imposes no other obligation upon him. It is clear, therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, *express*. The question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an *implied* promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found reviewed in *Eastwood v. Kenyon* (*supra*, p. 143); cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are inapplicable to the present; which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

Rule absolute.

LAMPLEIGH v. BRATHWAIT.

COMMON PLEAS. 1615.

HOBART, 105.

[*Voluntary courtesy moved by request.*]

ANTHONY LAMPLEIGH brought an Assumpsit against Thomas Brathwait; and declared, that whereas the defendant had feloniously slain one Patrick Mahume, the defendant after the said felony done, instantly required the plaintiff to labour, and do his endeavour to obtain his pardon from the King. Whereupon the plaintiff upon the same request did, by all the means he could and many days' labour, do his endeavour to obtain the King's pardon for the said felony, viz. in riding and journeying at his own charges from London to Royston, when the King was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony. Afterwards, in consideration of the premises, the said defendant did promise the said plaintiff to give him 100 pounds; and that he had not; to his damage 120 pounds.

To this the defendant pleaded Non Assumpsit. Found for the plaintiff, damage one hundred pounds. It was said in arrest of judgment, that the consideration was past.

But the chief objection was, that it doth not appear that he did any thing towards the obtaining of the pardon, but riding up and down, and nothing done when he came there. And of this opinion was my brother Warburton; but myself and the other two Judges were of opinion for the plaintiff, and so he had judgment.

It was agreed that a mere voluntary courtesy will not have a consideration to uphold an Assumpsit. But if that courtesy were moved by a suit or request of the party that gives the Assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference....¹

¹ *Hunt v. Baker* (Dyer, 272); [cited in *Sidenham v. Worlington*, *supra*, p. 165].

The issue found *ut supra* is a proof that he did his endeavour, according to the request, for else the issue could not have been found. For that is the difference between a promise upon a consideration executed and executory; that in the executed you cannot traverse the consideration by itself, because it is passed and incorporated and coupled with the promise. And if it were not indeed then acted, it is *nudum pactum*.

But if it be Executory (as "in consideration, that you shall serve me a year, I will give you ten pounds"); here you cannot bring your action, till the service performed. But if it were a promise on either side executory, it needs not to aver performance, for it is the counter-promise, and not the performance, that makes the consideration....

It was neither required, nor promised, to obtain the pardon, but to do his endeavour to obtain it; the one was his end, and the other his office. Now then he hath laid expressly, in general, that he did his endeavour to obtain it, viz. in equitando, &c. to obtain. Now then, if upon the trial he could have proved no riding nor journeying, yet any other effectual endeavour according to the request would have served.... Suppose he had ridden to that purpose, and Brathwait had died, or himself, before he could do anything else; or that another had obtained the pardon before, or the like; yet the promise had holden¹....

KAYE v. DUTTON.

COMMON PLEAS. 1844.

7 MANNING & GRANGER, 807.

[*Conveyance executed upon request—No interest passed.—
Subsequent Promise.*]

[ASSUMPSIT. The declaration stated, that, by a certain agreement in writing made by the defendant, on September 22nd, 1836—after reciting that one Whitnall, in his life-time, assured by deeds his freehold dwelling-houses unto R. Rockliff and H. Bullen, their heirs and assigns, by way of mortgage, to secure the repayment of 3500*l.*; and also reciting that Rockliff and Bullen required Whitnall to obtain the plaintiff to join him in a bond as a collateral security further to secure the repayment of the said sum of 3500*l.* and interest; and also reciting that the defendant had, since the death of Whitnall, taken upon himself the management of the estate of Whitnall, and had paid to Rockliff and Bullen 3370*l.*; and also reciting that Bullen and Rockliff had called upon the plaintiff for payment of the said mortgage, *and he was surety* for the said Whitnall in the said bond, and that the plaintiff thereupon paid to the said Bullen and Rockliff the sum of 130*l.* on the 1st of May, 1835; and also reciting that the defendant had repaid the plaintiff the sum of 48*l.* leaving due to him the sum of 82*l.*, and that such last-mentioned amount the

¹ [EDITOR'S NOTE. If, when a service is requested, the parties mean it to be paid for, a subsequent promise of a definite sum "may be treated as an admission which evidences—or as a positive bargain which fixes—the amount of that reasonable remuneration on the faith of which the service was rendered": Bowen, L.J., (L.R. [1892] 1 Ch. at p. 115).]

defendant had agreed to repay to the plaintiff out of the moneys which might arise from the sale of the said hereditaments when the same should be sold, and in the meantime to appropriate the rents of the said hereditaments towards payment of the same sum, *as the plaintiff had a lien on the said hereditaments for the said sum of 82l.; and also reciting that the defendant had requested the plaintiff to release and convey all his estate and interest in the said hereditaments to Alison and Lenox, and that that he had already done*, reserving to himself a lien on the said property as aforesaid—It was by the said agreement in writing witnessed, that, in consideration of the plaintiff's having paid to Bullen and Rockliff the said sum of 130l., in part discharge of the said mortgage, and in consideration of the plaintiff's having conveyed all his estate and interest in the said hereditaments to Alison and Lenox (*reserving to himself the said lien*), and in order to secure to the plaintiff the repayment of the said sum of 82l., the defendant did thereby agree with the plaintiff, his executors, administrators, and assigns, to pay to him or them the said sum of 82l., with interest thereon, out of the proceeds to arise from the sale of the said hereditaments, when the same should be sold; and, in the meantime, and until such sale was effected, to appropriate the rents of the said hereditaments in liquidation of the said sum so due. Averment, that, the said agreement being so made as aforesaid, he, the defendant, *in consideration of the premises*, afterwards, to wit, on the said 22nd of September, 1836, promised the plaintiff to perform the said agreement; that, after the said agreement was made as aforesaid, and before the said sale therein mentioned was effected, the defendant received the said rents in the said agreement mentioned, to the amount of 2000l., which he could and ought, according to the said agreement, to have appropriated in liquidation of the said sum of 82l. so due to the plaintiff as aforesaid. Yet the defendant, disregarding the said agreement and his said promise, did not nor would (although requested by the plaintiff so to do), appropriate the said rents so received by him, or any part thereof, in liquidation of the said sum of 82l., and the last-mentioned sum of 82l. is still wholly due and unpaid to the plaintiff.

To this count the defendant objected.]

* * * * *

Channell, Serjt., for plaintiff. The declaration is good. The defendant's promise being laid to have been made "in consideration of the premises," that is, of all that is stated in the foregoing part of the declaration, it is submitted that the facts alleged disclose a sufficient legal consideration. Admitting that a mere moral consideration ordinarily will not sustain a promise, here a legal consideration is apparent. If the defendant had *any* estate or interest to convey, his parting with it at the defendant's request, would be an ample consideration: and upon this declaration it is not competent for the defendant to say that the plaintiff did not release some interest in the mortgaged premises. Having paid money as surety for the mortgagor he would stand in his place, and if any interest can be inferred beyond the lien, there is a good consideration. The difficulty arises on the words "reserving to himself a lien on the said

property." The fair meaning of that is, that the plaintiff had given up his lien so far as regarded Alison and Lenox, but preserved it as between himself and the defendant....

A past consideration is not sufficient to support a subsequent promise, unless there was a request by the party, either express or implied, at the time of performing the consideration; but where there is an express request at the time, it will in all cases be sufficient to support a subsequent promise. Here, what is treated as a past consideration is stated to have been done because of the defendant's request. Cases have been cited to shew that the past consideration here stated, does not support the particular promise alleged in the declaration: but those cases are distinguishable; as, in all of them, the promise implied by law differed widely from that alleged on the face of the declaration. The question how far a moral consideration will support a subsequent express promise, is discussed by Lord Denman, in *Eastwood v. Kenyon* (*supra*, p. 143). Looking at the whole declaration, a sufficient consideration appears for the promise laid.

TINDAL, C.J....Two objections were made to the declaration—first, that it did not shew any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, e.g. *Roscorla v. Thomas* (*supra*, p. 167), do support that proposition to this extent—that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and, consequently, any promise made afterwards must be *nudum pactum*. But the case may, perhaps, be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself or conferred a benefit on the defendant, at his request, under circumstances which would not raise any implied promise. In such cases it appears to have been held, in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Baker*¹ seems to go to that extent. But it is not necessary that we should pronounce any opinion upon that point; for, assuming it to be sufficiently alleged that the plaintiff conveyed his interest *at the request* of the defendant, yet it does not appear that he had any interest which passed by such conveyance. The declaration is founded on an agreement...to appropriate the rents of the premises to the payment of the same sum as that for which the plaintiff had a lien on the said premises. Thus far there is nothing to shew that the plaintiff had any other interest than this lien. The agreement then recites that

¹ [Cited *supra*, p. 165, in *Sidenham v. Worlington*.]

the defendant had requested the plaintiff to release and convey his interest to Alison and Lenox, and that he had done so, *reserving to himself a lien on the property as aforesaid*, that is, reserving to himself the only interest that he is shewn to have had. The agreement then proceeds to state that, in consideration of the plaintiff having paid the money and having released and conveyed all his estate and interest to Alison and Lenox, reserving to himself *the said lien*, the defendant undertook and agreed, &c. Now, the payment of the money by the plaintiff would be no consideration for the defendant's promise; and the alleged conveyance was no consideration, for it does not appear that the plaintiff parted with any thing by it. For the plaintiff it was contended, that he must be taken to have parted with his lien on the property, reserving only his right to call *upon the defendant* to pay....But we cannot put that construction upon the agreement, which expressly speaks of the lien reserved as the same lien which the plaintiff had before.

Such being the effect of the agreement set out in the declaration, the case resembles that of *Edwards v. Baugh* (11 M. & W. 641). There, the declaration alleged that certain disputes were pending between the plaintiff and defendant, as to whether the defendant was indebted to the plaintiff in a certain sum of money; and that thereupon, in consideration that the plaintiff would promise the defendant not to sue him for the recovery of the said sum in dispute, but would accept a smaller sum in full satisfaction, the defendant promised to pay such smaller sum. On general demurrer, the declaration was held bad, because it did not allege that any debt was due from the defendant to the plaintiff, or that an action had been commenced for the recovery of any sum claimed. So, in the present case, as the declaration does not shew that the plaintiff had any interest in the premises except that which he reserved, it does not appear that his release and conveyance, although executed at the defendant's request, formed any legal consideration for the promise alleged to have been made by the latter.

Judgment for defendant.

FLIGHT v. BEED.

EXCHEQUER. 1863.

1 HURLSTONE & COLTMAN, 703.

[*Loan void for usury—Repeal of Usury Acts—
Subsequent promise to repay.*]

[DECLARATION on six bills of exchange, drawn in the years 1855 and 1856, by the plaintiff upon and accepted by the defendant. Plea: that, before the making of the bills it was, corruptly and against the form of the Usury Statute, agreed that the plaintiff should lend 1500*l.* to the defendant and one Robinson; and that he should forbear and give day of payment to them until a future day, and that for such forbearance they should pay to him more than the lawful interest of 5*l.* per cent. per annum upon the sum so lent; and that, for securing the repayment of the 1500*l.* and interest, the defendant and Robinson should accept certain bills of exchange drawn by the plaintiff upon them, whereby they engaged

to pay to the plaintiff 1600*l.*, ten weeks after the date thereof and of the loan. That in pursuance of the said unlawful agreement the plaintiff made the loan, and the defendant and Robinson accepted the bills, and that save as above there was no consideration for them; that these bills were dishonoured at maturity; and that those bills of exchange declared on were given, after the repeal of the Usury Laws by 17 & 18 Viet. c. 90, by way of renewal of the said first-mentioned bills, and to secure the payment to the plaintiff of the money secured by the first-named bills and the said usurious interest. And that save as aforesaid there was not any value or consideration for the acceptance by the defendant of the bills sued on.

Demurrer.

Macnamara, for defendant. At the time the original bills were given an usurious contract was not only void but also illegal; for the person who received money under it was subject to a penalty of treble the value, imposed by the 12 Anne, stat. 2, c. 16. The bills declared on were drawn and accepted in the years 1855 and 1856, and therefore after the usury law was repealed by the 17 & 18 Viet. c. 90. But they were accepted to secure the payment of money lent upon an usurious contract, and therefore were tainted with the original usurious contract; and, that being void, there was no consideration for them. The case falls within the 2nd section of the 17 & 18 Viet. c. 90, which preserves all liabilities in respect of transactions previous to that Act. There is no new contract, but merely a renewed security for payment of money under an usurious contract. Where a bill of exchange tainted with usury was in the hands of an innocent holder; and, on being informed of the usury, he took a fresh bill in lieu of it, drawn by one of the parties to the usurious contract, and accepted by a third person for his accommodation; it was held that the holder could not maintain an action against the acceptor of the substituted bill: *Chapman v. Black* (2 B. & Ald. 588).

[*POLLOCK*, C.B. If the innocent holder of a promissory note made for an usurious consideration took from the maker of it a bond for payment of the amount, the bond was valid; *Cuthbert v. Haley* (8 T.R. 390).

CHANNELL, B. The 58 Geo. 3, c. 93, enacts that no promissory note given upon an usurious contract shall be void in the hands of an indorsee for valuable consideration without notice.]

Cuthbert v. Haley does not support the proposition contended for; the Court expressed an opinion that a substituted security given for a security tainted with usury is void if given to a party to the original contract. *Wicks v. Gogerley* (R. & M. 123) decided that a new promise to pay the principal originally lent on an usurious agreement is invalid, unless all payments beyond legal interest are repaid or deducted. Here the substituted security is for the principal and usurious interest.

The receipt of the money under the usurious contract is no consideration for a new promise to pay it. There is a distinction between cases where there is a moral consideration for payment of a debt not enforceable at law (as where an infant after attaining his majority promises to pay a debt contracted during infancy), and where a statute has expressly declared that a particular contract shall be illegal and void.

In the former case the duty constitutes a sufficient consideration for a promise to pay the debt; but in the latter, the contract being declared void and an offence at law, there can be no consideration for any new promise.

MARTIN, B....The consideration for the bills declared on was the usurious loan, and the bills of exchange given to secure it. But the statute of Anne declared these to be utterly void; and I cannot understand how an utterly void and illegal contract can be a legal consideration for a new contract. If an usurious bill be in the hands of a holder who was a party to the usurious transaction, and he gives it up for a substituted security, the original usurious taint infects the subsequent security, and either is void. The consequence seems to me inevitable that the bills of exchange sued on are not of avail in the hands of the plaintiff, who was the usurious lender, and that the plea is good.

But a case of *Barnes v. Hedley* (2 Taunt. 184) was cited. A person called Webb had agreed to lend money at 5*l.* per cent. interest, but with a proviso that he should also receive a commission of 5*l.* per cent. upon sugars to be bought of him, and certain deeds and securities were given to him to secure the balance due. It was admitted at the trial that this was an usurious contract. But it was proved that in consequence of its being intimated to Webb that it was so, it was agreed that Webb should make out fresh accounts, leave out all the usurious charges, charge only for the principal money and legal interest, and that the deeds and securities should be given up and cancelled. Webb accordingly made out such fresh accounts, in which he omitted the usurious charges; and the balance sought to be recovered in the action was composed of the principal actually advanced, with lawful interest legally calculated, the whole commission and every objectionable charge being omitted. The debtor acknowledged the balance, and promised to pay it; and thereupon the deeds and securities originally given to Webb were burnt in the presence of the debtor. The Court of Common Pleas held that the balance so arrived at and promised to be paid was recoverable at law. I cannot myself see the application of this case to the present. If the plaintiff and defendant had accounted together and struck off the usurious interest, and the latter had given the bills, declared on, for the amount of the original loan and legal interest, it would have been an authority in favour of the plaintiff. But the contrary appears, for the bills declared on are stated to have been given to secure the payment of the money secured by the bills of exchange given in furtherance of the illegal contract.

The case has been put thus, that when the bills declared on were given, there was no usury law, and it was competent for the defendant to pay interest to any extent, and that the bills were lawful, assuming them to have been given for a loan then made. This is quite true, but it has no application to the real case under consideration. There was no loan after the repealing statute was passed. There was no correction of the original unlawful transaction. There is nothing whatever except bills given upon and in respect of a transaction which the law had declared to be utterly void; and which at one time seems to have been considered an indictable crime.

In *Wright v. Wheeler* (1 Camp. 165), there had been an usurious contract; but afterwards the parties agreed that some usurious interest which had been paid should be deducted from the principal, and a bond given for the balance of the principal, with lawful interest. Lawrence, J., was of opinion that the bond was lawful. The parties, he said, had substituted for an illegal contract one which was legal. The case has no bearing upon the present. There is here no substitution of a legal contract for an illegal one; it is a mere continuance of the old unlawful contract.

The result is, that in my opinion an usurious loan within the statute of Anne is not a good consideration for a bill of exchange, and a bill given upon such consideration is not of avail. This opinion does not contravene *Barnes v. Hedley*, or any other authority which has been referred to; but on the contrary, in my opinion, is in conformity with them all.

POLLOCK, C.B. The original bills were given for an advance of money with usurious interest at a time when such a transaction was forbidden by law, and were therefore void and of no legal obligation. The bills sued on were given since the repeal of the usury law, and at a time when the giving or confirming an obligation to pay any amount of interest however high was perfectly legal and binding.

But the altered law did not render valid the original bills; they were void when given, and remained void up to the time when they were renewed by the bills in question. The original bills therefore could not form a legal consideration for those now sued upon. Indeed there was, when the fresh bills were given, no legal obligation whatever upon the defendant to repay a single farthing of the large advance he had received. But for that advance he has voluntarily given these bills, and whether the law will enforce such a contract is the question....

There are many conjunctures in which a man may feel himself morally bound to pay money, and promise to do so, which the law would not recognise as forming a good consideration. But a loan of money is a very different thing. The very name of a loan imports that it was the understanding and intention of both parties that the money should be repaid. And though at the time of the advance the law, for reasons of public policy, forbid any liability, and incapacitate the parties from making a binding contract, there is no reason why a binding contract should not be made afterwards if the legal prohibition be removed. And the consideration which would have been sufficient to support the promise, if the law had not forbidden the promise to be made originally, does not cease to be sufficient when the legal restriction is abrogated.

There is, therefore, reasonable ground, as it seems to us, for this qualified proposition, viz.—That a man by express promise may render himself liable to pay back money which he has received as a loan though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt. There is likewise authority for it. The general doctrine within which such a proposition falls is, we believe, first found promulgated in Lord Mansfield's time (Cowper 290, 544)...The principle of the rule laid down by Lord Mansfield is, that where the consideration was originally beneficial to the party promising, if he be protected from liability by some provision of the statute or

common law meant for his advantage, yet he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by law to perform it.

Instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate¹ and by the Statute of Limitations.

The view we have taken receives considerable support from the case of *Barnes v. Hedley*, which, if not a direct authority for the plaintiff, is somewhat similar in its circumstances; the usurious interest was in that case struck out, but now, since the repeal of the statute of Anne, there is nothing unlawful in usurious interest. Here the defendant says, "I could not then make the promise: I can now, and I am willing to do so."

The plaintiff is therefore, in our opinion², entitled to judgment.

Judgment for plaintiff.

[EDITOR'S NOTE. The student will do well to read Sir F. Pollock's remarks on this singular case, *Contracts*, ch. XIII.]

SECTION III

ADEQUACY OF CONSIDERATION

SIR ANTHONY STURLYN v. ALBANY.

QUEEN'S BENCH. 1587.

CROKE ELIZABETH, 67.

[Adequacy of consideration immaterial.]

ASSUMPSIT. The case was, the plaintiff had made a lease to J. S. of land for life, rendering rent. J. S. grants all his estate to the defendant. The rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could shew to him a deed that the rent was due, he would pay to him the rent and the arrearages. The plaintiff allegeth that upon such a day, &c. at Warwick he shewed unto him the Indenture of Lease by which the rent was due; and, notwithstanding, he had not paid him the rent and the arrearages due for four years. Upon *non assumpsit* pleaded it was found for the plaintiff and damages assessed to so much as the rent and arrearages did amount unto.

It was moved in arrest of judgment: 1. That there was no consideration to ground an action; for it is but the shewing of the deed, which is no consideration. 2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent, and a recovery in this action shall be no bar in another action.

¹ [EDITOR'S NOTE. *I.e.* certificate of discharge in bankruptcy. See footnote to *Eastwood v. Kenyon*, p. 145 *supra*.]

² [EDITOR'S NOTE. Wilde, B., and (the Law Journal's report adds) Channell, B., concurred in this judgment.]

But it was adjudged for the plaintiff. For when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action; and here the shewing of the deed is a cause to avoid suit; and the rent and arrearages may be assessed all in damages. But they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded.

Nota. In this case it was alleged that it hath been adjudged, when one assumeth to another that if he can shew him an obligation in which he was bound to him, he would pay him, and he did shew the obligation &c., that no action lieth upon this assumpsit; which was affirmed by the Justices.

BRET v. J. S. AND WIFE.

COMMON PLEAS. 1600.

CROKE ELIZABETH, 756.

[*Consideration—Natural affection.*]

ASSUMPSIT. The case was: That William Dracot, first husband to the feme, sent his son to table with the plaintiff for three years, and agreed to give unto him for every year 8*l.*, and died within the year. The feme, during her widowhood, in consideration of her natural affection to the son, and in consideration, that the son should continue during the residue of the time with the plaintiff, promised to the plaintiff to pay unto him 6*l.* 13*s.* 4*d.* for the tabling of the son for the time past; and 8*l.* for every year after, that he should continue there with the plaintiff. Afterwards she married the defendant, and the plaintiff brought his action as well for the 6*l.* 13*s.* 4*d.* as for the tabling for the two years following.

Warburton moved. That this action lay not. First, because it was an entire contract by her first husband for the entire year, which cannot be apportioned. Secondly, because natural affection is not sufficient to ground an Assumpsit without quid pro quo. Thirdly, that this is a contract for which action of debt lies, and not this action.

But all the Court held, that it was [*sic*] well lay. For as to the first, it is well apportionable, because it being for tabling, which he had taken, there ought to be recompense, although he departed within the year, or that the contracter died within the year. To the second, they agreed, that natural affection of itself is not a sufficient consideration to ground an assumpsit; for, although it be sufficient to raise an use¹, yet it is not sufficient to ground an action, without an express quid pro quo. But it is here good, because it is not only in consideration of affection, but that her son should afterwards continue at his table, which is good as well for the money due before, as for what should afterwards become due. And as to the third, True it is, that, if the contract had been only for the tabling afterwards, then debt would have lain, and not this action; but in regard it is conjoined with another thing, for which he could not have an action of debt (as it is here for this 6*l.* 13*s.* 4*d.*) an action upon the case lies for all (as debt with other things may be put into an arbitrament). Wherefore it was adjudged for the plaintiff.

¹ [EDITOR'S NOTE. See chap. VIII ("Of a modern Conveyance") in Williams' *Real Property*.]

BAINBRIDGE v. FIRMSTONE.

QUEEN'S BENCH. 1838.

8 ADOLPHUS & ELLIS, 743.

[Consideration—Detriment by Bailment.]

[THE declaration stated that, in consideration that plaintiff, at the request of defendant, had consented to allow defendant to weigh two boilers of the plaintiff, of great value, defendant promised that he would, within a reasonable time after the said weighing, give up the boilers in as perfect a condition as the same were in at the time of the consent so given; and that, although in pursuance of the consent, defendant did weigh the same boilers, yet defendant did not, within a reasonable time after the said weighing was effected, give up the boilers in as perfect &c., but wholly neglected and refused so to do; and, on the contrary thereof, defendant afterwards took the said boilers to pieces, and did not put the same together again, but left the same in a detached condition, and in many different pieces, whereby plaintiff hath been put to great trouble &c. Plea, Non assumpsit.]

A verdict was found for the defendant.

Bayley moved in arrest of judgment. The declaration shews no consideration. There should have been either detriment to the plaintiff, or benefit to the defendant. It does not appear that the defendant was to receive any remuneration.

LORD DENMAN, C.J. It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff; which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave.

PATTESON, J. The consideration is, that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit. At any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time.

Rule refused.

[EDITOR'S NOTE. Cf. the similar detriment involved in your bailment of a bill of exchange in order that the bailee may get it discounted for you; *Hart v. Miles* (4 C.B., N.S., 371).]

HAIGH AND ANOTHER v. BROOKS.

QUEEN'S BENCH. 1839.

10 ADOLPHUS & ELLIS, 309, 323.

[Giving up an invalid guarantee.]

[THIS action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giving up a guarantee of 10,000*l.* due from the acceptor to the plaintiffs. Plea, that the guarantee was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant; and so the giving it up was

no good consideration for the promise. The form of the guarantee was set out in the plea. "In *consideration of your being in advance* to Messrs John Lees and Sons, in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. John Brooks." Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guarantee were binding in law or not.]

* * * * *

Sir J. Campbell, Attorney-General, for defendant. First, the original guarantee was void; and, if so, then, secondly, the promise declared upon is without consideration. First, the guarantee expresses only the past consideration of the plaintiffs "being in advance." This is not sufficient ground for an assumpsit, no request being alleged. A valid consideration was essential to a promise at common law; and, when the Statute of Frauds required that the agreement, in certain cases, should be written, it thereby became necessary, not only that a proper consideration should exist, but that the writing¹ should distinctly shew it: *Wain v. Warlters* (5 East 10). A consideration cannot be intended; it must be actually expressed, or necessarily to be implied; *Raikes v. Todd* (8 A. & E. 846). Secondly; the guarantee being void, the undertaking substituted for it, without any new consideration, is void also. The case is no better than if a second guarantee had been given in the words of the first. A consideration, to support a promise, must have some value in point of law; *Rann v. Hughes* (*supra*, p. 121). A man may have in his hands a letter of which improper use might be made; but his delivering it up is no legal consideration. An unfounded action may create annoyance; but the renouncing it is no consideration in law for a promise. Where, indeed, there is a reasonable doubt, in point of law, whether the promisee would or would not succeed if the litigation were prosecuted, the case is different. It is argued that foregoing a security upon which the Statute of Limitations had attached would be a consideration; but there an action would lie on the security if the statute were not pleaded. Whether the giving up a bill drawn on a wrong stamp would be a consideration or not may be questionable; but the objection is not one of which the Court would take judicial notice: here the Court must take notice that the guarantee is invalid....As to the delivery, in this case, of the mere paper, it is not pretended that the paper had any value: the contract of guarantee, not the paper containing it, was the object really in question.

* * * * *

LORD DENMAN, C.J....It was argued for the defendant that this guarantee is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees's acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of

¹ [EDITOR'S NOTE. It was, however, found in practice that written guarantees so frequently omitted all reference to the consideration, that the Mercantile Law Amendment Act, 1856, abolished in *their case* the need for its appearance in the statutory memorandum.]

giving the guarantee, is an assertion open to argument. It may possibly have been intended as prospective. If the phrase had been "in consideration of your *becoming* in advance," or "*on condition* of your being in advance," such would have been the clear import¹. As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it. But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon *any consideration* which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters* (5 East 10), the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge. We therefore think the plea bad: and the demurrer must prevail.

Judgment for plaintiffs.

[On appeal to the Exchequer Chamber, the judgment was affirmed unanimously.... "It is the opinion of all the Court that there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract; and therefore this was a sufficient consideration for the promise declared upon.... And that the actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents."

Judgment affirmed.

GREAT NORTHERN RAILWAY COMPANY v. WITHAM.

COMMON PLEAS. 1873.

L.R., 9 C.P. 16.

[*Acceptance of tender—Consideration—Mutuality.*]

THE facts were as follows: In October, 1871, the plaintiffs advertised for tenders for the supply of goods (amongst other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows:

¹ See the discussion on the words "for giving his vote," in *Lord Huntingtower v. Gardiner*, 1 B. & C. 297.

"I, the undersigned, hereby undertake to supply the G.N.R. Company, for twelve months from the 1st of November, 1871, to 31st of October, 1872, with such quantities of each or any of the several articles named in the attached specification as the company's store-keeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side.

Samuel Witham."

The company's officer wrote in reply, as follows: "My directors have accepted your tender, to supply this company at Doncaster station any quantity they may order during the period ending 31st of October, 1872, of the descriptions of iron mentioned on the inclosed list, at the prices specified therein."

Several orders for iron were given by the company, which were from time to time duly executed by the defendant; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs, *Digby Seymour, Q.C.*, moved to enter a nonsuit, on the ground that the contract was void for want of mutuality. He contended that, as the company did not bind themselves to take any iron whatever from the defendant, his promise to supply them with iron was a promise without consideration. He cited *Lees v. Whitcomb* (*supra*, p. 123); *Burton v. Great Northern Railway Co.*, (9 Ex. 507).

KEATING, J....The order now in question was not executed; the defendant seeking to excuse himself from the performance of his agreement, because it was unilateral, the company not being bound to give the order. The ground upon which it was put by Mr Seymour was, that there was no consideration for the defendant's promise to supply the goods. In other words, that inasmuch as there was no obligation on the company to give an order, there was no consideration moving from the company, and therefore no obligation on the defendant to supply the goods. The case mainly relied on in support of that contention was *Burton v. Great Northern Railway Co.* But that was the converse case. The Court there held that no action would lie against the company for not giving an order. If, before the order was given, the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise.

BRETT, J....The objection to the plaintiffs' right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, "If you will go to York, I will give you 100*l.*," that is in a certain sense a unilateral contract. He has not promised to go to York. But if he goes, it cannot be doubted that he will be entitled to the 100*l.* His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price"; if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise. So, here,

the company having given the defendant an order at his request, his acceptance of the order would bind them. This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.

[EDITOR'S NOTE. As to advertisements *inviting* tenders, see *Spencer v. Harding*, *supra*, p. 8.]

PERCIVAL LD. *v.* LONDON COUNTY COUNCIL.

KING'S BENCH DIVISION. 1918.

87 L.J.R., K.B.D. 678.

* * * * *

ATKIN, J....Tenders have been the subject of litigation before now, and they vary in form. But one knows that it is quite common for large bodies, that require supplies over a year, to ask for tenders and to obtain them. It sometimes happens that the effect of the form of the tender, with an acceptance, is to make a firm contract by which the purchasing body undertakes to buy all the specified material from the contractor. On the other hand, these tenders are very often in a form under which the purchasing body is not bound to give the tenderer any order at all. The contractor offers to supply goods at a price, and if the purchasing body chooses to give him an order for goods during the stipulated time, then he is under an obligation to supply the goods in accordance with the order; but apart from that nobody is bound. There is also an intermediate contract that can be made; in which, although the parties are not bound to any specified quantity, yet they bind themselves to buy and to pay for all the goods that are in fact needed by them. Of course if there is a contract such as that, then there is a binding contract; which will be broken if the purchasing body in fact do need some of the articles and do not take them from the tenderer....

In the case of a contract of the first kind, where a man is asked to tender in advance for large quantities, he must in the ordinary course expose himself to certain liabilities in advance; and it may seem very one-sided that the contractor should be bound on the one side but that the purchasing body should not be bound on the other. But the answer is that that is the contract the parties chose to make; and certainly it is not in my experience an unusual contract. *Great Northern Railway Co. v. Witham* (*supra*, p. 180) and other cases are instances for the last forty years of this kind of contract being entered into by business people. No doubt they rely on the matter going through, in the ordinary course, very much in the terms of the contract. Sometimes it happens that they are disappointed. That is a business risk; which a person who signs a contract in express language must put up with.

CHAPTER IV

CAPACITY OF PARTIES

SECTION I

POLITICAL STATUS

PORTER v. FREUDENBERG.

COURT OF APPEAL. 1915.

L.R. [1915] 1 K.B. 857.

[*Definition and disability of alien enemies.*]

LORD READING, C.J....It is necessary to keep clearly in mind the meaning of the term "alien enemy" when used in reference to civil rights and liabilities. Its natural meaning indicates a subject of enemy nationality, that is, of a State at war with the King; and would not in any circumstances include a subject of a neutral State or of the British Crown. But that is not the sense in which the term is used in reference to civil rights¹.

Ever since the great case of *The Hoop* (1 C. Rob., 196) [in 1799], the law has been firmly established that one of the consequences of war is the absolute interdiction of all commercial intercourse or correspondence by a British subject with the *inhabitants* of the hostile country, except by permission of the Sovereign²....When considering the enforcement of civil rights, a person may be treated as the subject of an enemy state notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely, a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State....[But] alien enemies have no civil rights or privileges, unless they are here under the protection and by permission of the Crown....The authorities agree that [otherwise] an alien enemy cannot enforce his civil rights and cannot sue or proceed in the civil Courts of the realm.... The latest adjudication upon the right to sue is *Princess Thurn and Taxis v. Moffitt* (L.R. [1915] 1 Ch. 58), where Sargant, J., held that the subject of an enemy State who is registered under the Aliens Restriction Act, 1914, as an alien and the subject of an enemy State, is entitled to sue in the King's Courts. This decision is, in our opinion, clearly right. Such an alien is resident here by tacit permission of the Crown. He has by registration informed the Executive of his presence in this country and

¹ [EDITOR'S NOTE. For these civil rights depend, not upon Nationality, nor upon legal Domicil, but upon the Locality of residence or business.]

² [EDITOR'S NOTE. "A declaration of War is...an order to every military subject of the Crown to fight as he shall be directed: and an order to every civilian subject of the Crown to cease to trade with the enemy"; *per* Lord Wrenbury, (L.R. [1916] 2 A.C. at p. 671).]

has been allowed thereafter to remain here. He is "Sub protectione domine regis¹."...

To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King, or alien friends, to enforce their rights with the assistance of the King against the enemy. *Prima facie* there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy; but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Mr Justice Bailhache in *Robinson and Co. v. Continental I. C. Mannheim* (L.R. [1915], 1 K.B. 159), "To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy; and to defeat the object and reason of the suspensory rule." The effect would be to convert that which during war is a disability imposed upon the alien enemy, because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects....

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice; and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice. Equally it seems to result that, if judgment proceed against him, the Appellate Courts are as much open to him as to any other defendant....

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy *plaintiff*; that is, a person who before the outbreak of war was a plaintiff in a suit and then by virtue of his residence or place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment has been pronounced against him before the war in an action in which he is plaintiff, can he present an appeal to the Appellate Courts of the King? We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance and an alien enemy seeking to enforce such right by recourse to the Appellate Courts. He is in either case seeking to enforce his right by invoking the assistance of the King in his Courts. He is the *actor* throughout....If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace....

¹ [EDITOR'S NOTE. In *Schaffenius v. Goldberg* (L.R. [1916] 1 K.B. 284) it was held that *such* an alien enemy will not necessarily lose his rights even by being interned.]

RODRIGUEZ v. SPEYER BROTHERS.

HOUSE OF LORDS. 1918.

L.R. [1919] A.C. 59.

[Limitation on alien enemy's disability.]

[SPEYER BROTHERS was a firm of six persons who carried on business in London as bankers. The outbreak of the war with Germany ipso facto dissolved the partnership, as one partner was a German subject and resident in Germany. During the war an action was commenced by the firm, in the partnership name, against Rodriguez to recover a debt due from him to them before the war. Judgment was signed in their favour, in default of defendant's appearance: but was set aside on the ground that the firm had no right to sue, inasmuch as one of them was an alien enemy. The Court of Appeal, by a majority, discharged this order, and remitted the case for rehearing on the merits (87 L.J.R., K.B. 171). The defendant appealed to the House of Lords, who were divided in opinion.]

LORD FINLAY, L.C....The proposition that an alien enemy cannot bring an action in this country has been often laid down. The question which now for the first time falls to be determined is, whether the rule forbidding such an action during the continuance of the war is unqualified; and, in particular, whether it applies to a case in which, for the winding up of the affairs of a partnership dissolved by the outbreak of war, there is joined as a co-plaintiff one who, having been a partner when war broke out, thereon became an enemy alien. There is no doubt that, as a general rule, an action by an alien enemy might be met by a plea in abatement; while a contract made with an alien enemy during the war was void, and might be met by a plea in bar. But the general terms in which the rule has been laid down do not carry us very far in dealing with the special circumstances of the present case. The question is whether the rule applies so as to prevent British subjects during the war from recovering a debt which had been contracted in their favour jointly with one who has since become an enemy. It is obvious that, if the rule does extend to such a case, British partners could not get in their assets until the war was over. They would be non-suited for not having joined their co-contractor as a plaintiff if they left him out; and the action would be stopped by a plea in abatement or on summons if they put him in....

There is no case in which the rule against an enemy alien being allowed to sue has been applied to a case in which he is suing not in his own interest, but because his concurrence is necessary for the protection of the interests of the firm. He is not, in point of law, suing en autre droit; but he is under a legal obligation to concur as a necessary party to an action which must be brought in the interests of the firm. And in these circumstances, in my opinion, his presence either as plaintiff or defendant gives rise to none of the objections which have been raised to suits by alien enemies....

LORD SUMNER....It is hard on British subjects, who have been partners with one who is now an enemy, to have the liquidation of partnership-concerns impeded. It may be hard, and yet wholesome for

all that. The question is whether the rule, as it has been invariably formulated and applied hitherto, can be understood as having been all along subject to an implied and unmentioned limitation that would leave such a case outside it. The argument appears to be that our law cannot be so crude as to work this inconvenience, even if it does date from the Plantagenets; and that, if no trace is to be found in the books of this limitation in a history of five hundred years, that is because partnerships between subjects and aliens have been few before the age of steam and telegraphs, and because the case has never arisen, owing to our insufficient participation in European wars. I cannot help thinking that there must have been many partnerships between subjects and Frenchmen or Dutchmen during the many wars of the eighteenth century. Really, the contention must be that the disability of an alien enemy, being only personal, cannot extend to disabling other persons, who, in themselves, are competent and meritorious. But if you come to think of it, this is due to the necessity for making all the co-contractors parties to the action, and not to the rule which disables one of them, whether he be a party jointly or severally. Why criticise this rule and undermine its principle on account of hardship which is caused by another rule? As a matter of fact, the law has not much troubled about such collateral inconveniences. Not so long ago, the conviction of a partner for felony must have been very inconvenient to other partners....A body of law, which, like ours, has grown through a long period of intensely conservative and unsystematic development, is sure to contain gaps—blemishes, if you will—which a philosopher or a nomothete would have contrived to avoid. It cannot be helped. It is too late for law courts to improve or explain them away. That is for the Legislature.

LORD PARMOOR....There is no absolute rule of law which prohibits the use of the name of an alien enemy, who has been a partner with British subjects prior to the outbreak of war, when it is necessary to enforce the payment of debts to which persons had become liable in lawful transactions, when the real object is either to meet the claims of British creditors, or to protect the interests of the British partners. To hold the contrary would be to deprive British subjects, or neutral aliens, of rights which have been held the necessary concomitant of lawful commercial transactions....

* * * * *

[The decision of the Court of Appeal was disapproved by Lord Atkinson and Lord Sumner; but approved by Lord Finlay, L.C., Viscount Haldane and Lord Parmoor.]

Appeal dismissed.

ERTEL BIEBER AND CO. v. RIO TINTO CO. LD.

HOUSE OF LORDS. 1918.

L.R. [1918] A.C. 260.

[*Trade with enemy—Suspensory clause.*]

[THE Rio Tinto Co. Ltd. was incorporated in England: it owned large mines of cupreous sulphur ore in Spain. Before the war it had made

contracts for the supply of such ore to Ertel Bieber & Co. who were a German company. Each contract contained a Suspensory Clause, providing that if, owing to strikes or war or any other cause over which the sellers had no control, they should be prevented from shipping or delivering the ore, the obligation so to do should be suspended during the continuance of the impediment and for a reasonable time afterwards. A corresponding provision in favour of the buyers was added.

The sellers commenced an action against the buyers, under the Legal Proceedings against Enemies Act, 1915, claiming a declaration that the contracts were abrogated and avoided by the war. Sankey, J., made this declaration (L.R. [1916] 1 K.B. 341): and the Court of Appeal affirmed his decision. The defendant company appealed.]

Compston, K.C., for appellant....Only those contracts are dissolved which in fact involve intercourse with the enemy; and if the parties have by their contract provided that in the event of war there shall be no communication between them the contract is not determined.... A contract is illegal only so far as it affords assistance to the enemy during the war; it is no objection to the contract that it may profit the enemy after peace is restored....

* * * * *

LORD SUMNER....In *Esposito v. Bowden* (7 E. & B: 763) the Court decided in express terms that illegality does not suspend; it dissolves. What the law forbids is impossible of performance to those who owe obedience to that law; and this higher public obligation discharges any private obligation to the contrary....It occurred, however, within recent years, to some ingenious mind, obviously with the desire to prefer private commerce to public principle, that a clause of Suspension might secure to particular contracts that continued existence during war which the Exchequer Chamber had denied generally. To negotiate with an enemy towards the end of a war for the conclusion of a contract to sell and deliver goods as soon as peace should be signed would be a crime. But to stand bound to do so by a contractual tie throughout the war might possibly be lawful, if only the contract was concluded before the war with a provident eye to the possibility of its occurrence. Hence the disputes of which the present appeal is a type. Does a suspensory clause oust the application of the general rule?...

If, upon public grounds, on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject, for his private advantage, to withdraw his contract from the operation of the law and to claim to do what the law rejects—merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made. And if occasionally the contract is said to be only suspended, or, a Court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war....

To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The Courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Willes, J., in *Esposito's Case*: "In all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each (on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period) may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising" (7 E. & B. at p. 792)....

If these suspensory clauses are valid, the enemy knows three things: the first, that he may expend certain of his material resources without stint, for his right to replenish them in enormous quantities is assured at or shortly after the conclusion of peace; the second, that the present employment of these raw materials as British resources during the war, whether in the way of commerce or in the actual supply of combatant needs, is hampered by the existence of huge future commitments, performable at an uncertain and perhaps not distant date; the third, that he may rest assured that the imposition of commercial disadvantages in the treaty of peace is pro tanto neutralised, and that military resistance may be prolonged in proportion. I think it plain, as it was thought by the Courts below, that such suspensive clauses as are in question here tend to defeat the successful conduct of the war on His Majesty's part, and are therefore contrary to public policy and render the contracts void....

[The judgments were unanimous.]

Appeal dismissed.

MIGHELL v. SULTAN OF JOHORE.

COURT OF APPEAL. 1893.

L.R. [1894] 1 Q.B. 149.

[*Ruler of Sovereign State—Immunity from civil process.*]

APPEAL of the plaintiff from the order of a Divisional Court staying further proceedings.

The action was brought to recover damages for breach of promise of marriage, and to recover a pair of diamond buckles or their value. It appeared from the evidence that the defendant, while residing in this country, observed a strict *incognito*, and was known under the name of Albert Baker, that he had in the year 1885 under that name made a proposal of marriage to the plaintiff, which she had accepted. The plaintiff also swore that it was subsequently to the proposal she learnt for the first time what the true name and position of the defendant was, and that in answer to her inquiries the defendant informed her that he was

under the command of the Queen of England, and that he had to obey the latter.

The defendant took out a summons to set aside the writ, alleging that the Court had no jurisdiction over him, as he was an independent sovereign. When the matter was in Chambers, a letter was sent by the Colonial Office to Mr Justice Wright, of which an extract is: "I am directed to acquaint you that Johore is an independent state in the Malay Peninsula, and that his Highness Abubakar is the present sovereign ruler thereof. The relations between himself and her Majesty the Queen, which are relations of alliance and not suzerainty and dependence, are now regulated by treaty. He exercises without question the usual attributes of a sovereign ruler." By article 6 of the treaty, the Sultan had surrendered the right of the State of Johore to enter into treaties with foreign States without the consent of her Majesty's Government, and had made over to her Majesty's Government the guidance and control of his foreign relations; and in return the treaty gave him the protection of England.

George White, for the plaintiff. There is no sufficient evidence that the defendant is an independent reigning sovereign. I am entitled to go behind the letter; *The Charkieh* (L.R., 4 A. & E. 59). The treaty shews that Johore is not an independent but a protected state.

[LORD ESHER, M.R.: Is Belgium then not a sovereign state? Is it not protected against invasion by certain powers?]

One of the attributes of sovereignty is the power of making treaties with foreign powers; and the effect of the treaty is a surrender of one of the essential sovereign rights.

The defendant has, by his acts, waived his sovereign rights in respect of acts done by him in his private capacity. *The Parlement Belge* (L.R., 5 P.D. 197) laid down too widely the rule exempting foreign sovereigns from the jurisdiction of our Courts. The English Courts have jurisdiction over foreign sovereigns: *Munden v. (Duke) Brunswick* (10 A. & E., N.S. 656); *Wadsworth v. Queen of Spain* (17 A. & E., N.S. 171); *Brunswick (Duke) v. King of Hanover* (2 H.C.L. 1). He also referred to Westlake's International Law, section 180. Vattel section 108; Grotius, c. 14, section 7.

LORD ESHER, M.R....The first point taken is, that no sufficient evidence was given that the Sultan of Johore is an independent sovereign prince. There is a letter written and signed on behalf of the Secretary of State for the Colonies stating, in answer to an inquiry made by the Court, that Johore is an independent State, and that the defendant is the sovereign ruler of that State. This is clearly a letter sent by the Secretary of State in his official capacity. He is the adviser of the Queen, and such a letter from him has the same effect in any of her Majesty's Courts as a letter from the Queen herself.

But it was said that the Judges ought to have gone further, and instituted inquiries into the history of the State of Johore. Sir Robert Phillimore made such inquiries in *The Charkieh*; but in *The Parlement Belge* this Court was of opinion that Sir Robert was wrong in so doing. A certificate from the Queen is enough, and it is not the duty of the Court to make any further inquiry.

The Sultan of Johore being a sovereign, can he be sued in the Courts of this country? It is not pretended that he can be, unless, by coming to this country under a false name, and living here under a false name, he has lost the privilege of an independent sovereign, and has thereby made himself subject to the jurisdiction of the municipal courts of this country. The whole matter was carefully considered in *The Parlement Belge*, and there the rule was broadly laid down, that (as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State), each and every one declines to exercise, by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign¹ of any other State, though such sovereign is within its territory. The only qualification would be where a foreign sovereign in any particular case voluntarily submits himself to the Court of the country where he is staying.

Now what is the time at which a foreign sovereign can be called upon to elect whether to submit to the jurisdiction of the Courts of this country or not? It must be taken to be at the time when the Court is asked to exercise authority over him, and not at any previous time. If, when the Court cites him or is about to cite him, he is in a position to prove, by the assent of the sovereign of this country, that he is an independent sovereign, it is then for him to say whether or not he will submit to the jurisdiction of the Court. If he does not submit, then the Court has no jurisdiction over him. The Court has no power to inquire into anything he may have done previously. In this case the Sultan of Johore has not submitted himself to the jurisdiction of the Court, and therefore the Court has no jurisdiction to entertain this action at all.

LOPES, L.J....A foreign sovereign may submit himself to the jurisdiction of the Courts of the country in which he comes to live. It is said that the Sultan of Johore has so submitted himself. But it is impossible to draw any such inference from the mere fact that he has lived under an assumed name, and has acted as a private individual. The only way in which a sovereign can become subject to the jurisdiction of any of our Courts is by a submission in the face of the Court.

Appeal dismissed.

SECTION II

INFANTS

RYDER v. WOMBWELL.

EXCHEQUER CHAMBER. 1868.

L.R., 4 Ex. 32.

Infant—Necessaries—Provinces of Judge and Jury.

THE declaration was for money payable for goods sold and delivered. Plea: Infancy. Replication: Necessaries. Issue thereon.

¹ [EDITOR'S NOTE. And an Ambassador "has at least as great privileges from suits as the sovereign whom he represents"; (2 E. & E. 94).]

The plaintiff sought to recover for the following (among other) articles of jewelry supplied by him to the defendant, a minor: First, a pair of crystal, ruby, and diamond solitaires, 25*l.*; and, secondly, a silver gilt antique chased goblet, engraved with an inscription, 15*l.* 15*s.*

The defendant was the younger son of a deceased baronet of large property in Yorkshire, and during his minority had an income of about 500*l.* per annum; and on attaining his majority he came into 20,000*l.* He moved in the highest society, and was in the habit of riding races for his friends, amongst others for the Marquis of Hastings, at whose house he was a frequent visitor, and for whom the goblet was intended, as the plaintiff knew when he supplied it, as a present....[No evidence was given of any circumstances rendering it exceptionally necessary for the defendant to have such articles.]...Evidence was offered on the part of the defendant, that, at the time of the purchase of the solitaires, he had purchased similar articles of jewelry to a large amount from other tradesmen, which rendered any further supply by the plaintiff unnecessary; but, as it was proved that the plaintiff was not aware of this fact, Kelly, L.C.B., rejected the evidence.

The jury found that the solitaires and the goblet were necessities suitable to the estate and condition in life of the defendant, and a verdict was accordingly entered for the plaintiff for 40*l.* 15*s.*, being the price of the solitaires and goblet. A rule was afterwards made absolute to reduce the verdict by 15*l.* 15*s.*, the price of the goblet; the majority of the Court being of opinion (L.R. 3 Ex. 90) that the verdict of the jury as to the solitaires ought not to be disturbed, and that the evidence offered to prove that the defendant, when the solitaires were supplied, was already sufficiently supplied with articles of a similar description, was properly rejected. [A dissentient judgment, of great value, was however given by Bramwell, B.]

BRAMWELL, B....The price of the solitaires is 25*l.*, owing to their costly material and manufacture, and the jewels with which they are adorned. I believe I am right in saying that studs such as a gentleman may well wear, might be bought for a trifle; or the wristbands may be buttoned with buttons, scores of which may be bought for a few pence. It was said that the question was for the jury; that the rule is that where the article is one of an useful class the question is one of fact to be decided by them. I cannot agree to this. It is extremely difficult to name anything which cannot be put to some use. Ear-rings for a male, spectacles for a blind person, a wild animal, might be suggested. But even they might come within the argument in support of the drinking-cup claim, viz., that they might be used for necessary and becoming presents. The argument seems to me to lead to an absurdity. Food is necessary; it is a question of fact, whether a daily dinner of turtle and venison for a month, is a necessary for a clerk with a salary of 1*l.* a week? A three-penny ride in an omnibus on a wet day may be a necessary for such a clerk, and save him its cost by saving his clothes. Is whether a coach and four is a necessary for him, a question of fact? Besides, suppose a jury ask what is the meaning of 'necessaries.' Does it mean in law, as in strictness, something indispensable? The answer must be, no. Then

when they ask what is the meaning, it is expounded to them as being something reasonably required for the nourishment, clothing, lodging, education, and decent behaviour and appearance, according to station. How can such an explanation include these articles?

There are some things which cannot be necessities. The ear-rings, the spectacles in the cases put, the wild animal, and all things which are useless except for amusement, or where the utility is the subordinate consideration and the ornament or amusement the principal. On the other hand, there are some things certainly necessities, bread, meat, vegetables, water. There are also things which may or may not be, and which give rise to questions for a jury. For instance, an infant orders an expensive coat; but it appears his trade or calling is of that nature that such a coat is necessary for his health; or it is shewn that a coat at half the price would not last half the time. Or if he has ordered a broad-cloth coat, and it is said he should have contented himself with fustian, evidence may be given as to his position, and as to how such people dress in that class in that neighbourhood, and then the question is for the jury. I think that in this case the jury should have been told to find for the defendant. If the argument as to the drinking-cup is right, and if the tradesman is bound to make no inquiry, why every case is for the jury, as an infant may always have some friend to whom he would like to give the useless article he has purchased. But I cannot see why that argument should be used. An infant must drink, and drink out of some vessel; therefore, the gold goblet is in the class of useful articles. It is observable that no one pledged his oath that these things were necessary, or gave any description of the articles, or their utility, or the cost of other contrivances for the purpose.

Further, I think evidence was admissible to shew that the defendant was supplied with similar articles. Suppose a baker delivered 100 loaves daily to an infant who could only consume one, would he be liable for the price of the other 99? Certainly not; because they were not necessities. But what difference does it make on this question, that they are supplied by one baker or a hundred? The question is like that which arises where a married woman has dealt on credit. There it is a question of authority, here of capacity; depending on whether the woman or infant is sufficiently supplied.... It is not a law for the indemnity and defence of the infant who is sued merely; it is a law to deter people from trusting infants....

[The defendant appealed to the Exchequer Chamber.]

Bulwer, Q.C., for the defendant, contended that a nonsuit ought to be entered, as there was no evidence proper to be left to the jury that the solitaires were necessities.... He contended, secondly, that the evidence was improperly rejected.

Popham Pike, for the plaintiff, contended that the question whether the solitaires were necessities was rightly left to the jury, and that they had come to a right conclusion.

With regard to the rejection of evidence, there was no case similar to the present.... The amount of an infant's income had been held immaterial: *Brayshaw v. Eaton* (7 Scott 183). Why should the amount of his income when he had turned his money into goods be material?

WILLES, J....There are two questions raised before us; first, whether there was evidence on which the jury might properly find that both or either of the articles were necessaries; on the determination of which depends whether the verdict should be restored to a verdict for the whole amount of 40*l.* 15*s.* or stand reduced to 25*l.*, or be altogether set aside and a nonsuit entered. Secondly, whether the evidence offered was admissible; the determination of which only affects the question whether there should be a new trial or not.

The general rule of law is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception; introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessaries. And the word 'necessaries' is not confined in its strict sense, to such articles as are necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station and degree in life in which he is.

The first question is whether there was any evidence to go to the jury that either of the articles was of that description. Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict and submit the question to the decision of another jury. But there is in every case (not merely in those arising on a plea of infancy), a preliminary question of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff or direct a verdict for the plaintiff if the onus is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case. But it is now settled that the question for the judge (subject of course to review) is, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established....And taking that as the proper test, we think that there was not in this case evidence on which the jury could reasonably find that it was necessary for maintaining the defendant in the station of life in which he moved, either that he should give goblets to his friends or wear shirt-buttons composed of diamonds and rubies costing 12*l.* 10*s.* a piece.

The question in such cases is not whether the expenditure is one which an infant, in the defendant's position, could not properly incur. There is no doubt that an infant may buy jewelry or plate, if he has the money to pay and pays for it. But the question is whether it is so necessary, for the purpose of maintaining himself in his station, that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessaries. The Lord Chief Baron, in his judgment, questions whether under any circumstances it is competent to the judge to determine as a matter of law, whether particular articles are or are not to be deemed necessaries suitable to the estate and condition of an infant; and whether, if in any case the

judge may so determine, his jurisdiction is not limited to those cases in which it is obvious that the articles in question cannot be necessities to any one of any condition whatever? This is an important principle which, if correct, fully supports the judgment below; but we cannot assent to it....The judges do know, as much as juries, what is the usual state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things. If a state of things exist (as it well may) so new or so exceptional that the judges do not know of it, that may be proved as a fact, and then it will be for the jury under a proper direction to decide the case. But it seems to us that if we were to say that in every case the jury are to be at liberty to find anything to be a necessary, on the ground that there may be some usage of society, not proved in evidence and not known to the Court, but which it is suggested that the jury may know, we should in effect say that the question for the jury was whether it was shabby in the defendant to plead infaney. We think the judges must determine whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception, and then whether there is any sufficient evidence to satisfy that onus. We hold that such articles as are here described are not *prima facie* necessary for maintaining a young man in any station of life; and that the burthen lay on the plaintiff to give evidence of something peculiar making them necessities in this special case; and that he has given no evidence at all to that effect.

The cases will, we think, be found to be quite consistent with this view. In *Peters v. Fleming* (6 M. & W. 42), the Court took judicial notice that it was *prima facie* not unreasonable that an undergraduate at college should have a watch, and consequently a watch chain; and that therefore it was a question for a jury whether the watch chain supplied on credit in that particular case was such a watch chain as was necessary to support himself properly in his degree. In laying down the law as to the particular case, Parke, B., says: "All such articles as are purely ornamental are to be rejected, as they cannot be requisite for any one." Possibly there may be exceptional cases in which things purely ornamental may be necessary. In such a state of things as we believe existed at the close of the last century it might have been a question for a jury whether it was not necessary, for the purpose of maintaining his station, for a young gentleman moving in society to purchase wigs and hair powder. But as a general rule, and in the absence of some evidence to shew that the usages of society required the use of such things, we think the rule laid down in *Peters v. Fleming* is correct....So in *Brooker v. Scot* (11 M. & W. 67), Parke, B., says: "*Prima facie*, these articles are not necessities under the circumstances, and the tradesmen must shew them to be so."...No doubt there are many cases in which the Court have held that such evidence had been given, and that the case could not be withdrawn from the jury; but none in which it is laid down that the Court is bound to consider itself ignorant of every usage of mankind, and therefore bound, in the absence of all evidence on the subject, to take the opinion of a jury as to whether it is not so necessary for a gentleman to wear solitaires of this description, that, though an infant, he must obtain

them on credit rather than go without....In the present case we do not understand any of the judges to proceed on the ground that they think that, in fact, the solitaires of this expensive character were really got for utility and that the degree of ornament was only accidental, or that the jury were not wrong if they so found; but on the ground that it was not a question for the Court at all.

Taking this view, it follows that the judgment should be reversed, and a nonsuit entered. It becomes therefore unnecessary to decide whether the evidence tendered was properly rejected or not. That is a question of some nicety, and the authorities are by no means uniform¹....

Nonsuit entered.

[EDITOR'S NOTE. In *Roberts v. Gray* (L.R. [1913] 1 K.B. 520) the Court of Appeal established that an infant's contract for necessities (e.g. education) is binding on him even when still partly or wholly executory. What is ancillary to necessities is itself necessary, e.g. an advertisement by the infant for obtaining a suitable teacher.]

VALENTINI v. CANALI.

QUEEN'S BENCH. 1889.

L.R., 24 Q.B.D. 166.

[*Infant—Contract—Infants' Relief Act, 1874.*]

APPEAL from the Woolwich County Court. The plaintiff claimed a declaration that a contract by which he agreed with the defendant to become tenant of a house, and to pay 102*l.* for the furniture therein, was void; and the return of 68*l.* paid by him on account; on the ground that he was an infant at the time when he entered into the contract. The plaintiff had occupied the premises and used the furniture for some months. The judge found in the plaintiff's favour on the issue of infancy; declared the contract to be void; ordered a promissory note given by the plaintiff for the balance due for the furniture to be cancelled; but refused to order the return of the sum paid. The plaintiff appealed.

Paget, for the plaintiff. By s. 1 of the Infants' Relief Act, 1874, "contracts entered into by infants for goods supplied" are declared to be "absolutely void." It is submitted that the effect is to entitle the plaintiff to recover back money paid by him under a contract which has been pronounced void, as upon a complete failure of consideration.

LORD COLERIDGE, C.J....The judge, in my opinion, did justice according to law. He set aside the contract, and he ordered the promissory note to be cancelled. It is now contended that, in addition to this relief, the plaintiff was entitled to an order for the repayment of the sum paid by him to the defendant, as money paid under a contract declared to be void. No doubt the words of the Infants' Relief Act, 1874, are strong and general; but a reasonable construction ought to be put upon them.

¹ [EDITOR'S NOTE. The legislature settled this disputed question by enacting in s. 2 of the Sale of Goods Act, 1893, that in case of an infant, or of a person insane or intoxicated, "necessaries" are to be such goods as are "suitable to his condition in life...and to his actual requirements at the time of sale and delivery." The burden of proving those requirements lies on the plaintiff; see *Nash v. Inman* (L.R. [1908] 2 K.B. 1) where the defendant was a Cambridge undergraduate, to whom during his Freshman's year a tailor had sold £145 worth of clothes.]

The construction which has been contended for on behalf of the plaintiff would involve a violation of natural justice. When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. The infant plaintiff had the use of a quantity of furniture for some months. He could not give back this benefit or replace the defendant in the position in which he was before the contract. The object of the statute would seem to have been to restore the law for the protection of infants; upon which judicial decisions were considered to have imposed qualifications. The legislature never intended, in making provisions for this purpose, to sanction a cruel injustice.

Appeal dismissed.

[EDITOR'S NOTE. But an infant is entitled to recover back what he has paid under a void contract if he "has not derived any real advantage from it." See *Hamilton v. Vaughan-Sherrin* (L.R. [1894] 3 Ch. 589) where the infant had applied for shares in a company and had paid for them, but repudiated them before attending any meeting of the Company or receiving any dividend; and consequently was held to be entitled to the return of the money paid.]

JENNINGS v. RUNDALL.

KING'S BENCH. 1799.

8 TERM REPORTS, 335.

[Contract of Infant—Action in Tort.]

[THE first count in this declaration stated that the plaintiff at the request of the defendant delivered to the defendant a certain mare of the plaintiff to be moderately ridden by the defendant; yet that the defendant, maliciously intending to injure the plaintiff, whilst the mare was in the defendant's custody under such delivery and before the same was returned to the plaintiff, wrongfully and injuriously rode the said mare in so improper a manner, and took such bad care thereof, that the said mare became and was greatly strained and damaged. In the second count it was alleged that the plaintiff at the request of the defendant let to hire and delivered to the defendant a certain other mare to go and perform a certain reasonable and moderate journey, yet that the defendant wrongfully and injuriously rode and worked the said mare a much longer journey.

The defendant pleaded his infancy to the two first counts, to which plea the plaintiff demurred.]

Marryat, for plaintiff....As the first count was not founded on a contract but on a tort, the defendant could not plead infancy to it. That count did not state any consideration for the delivery of the mare by the plaintiff to the defendant, or any promise by the defendant to take care of her or to redeliver her: but it appeared to be a delivery on bail to the defendant, who has abused the plaintiff's property. The tort here did not consist in mere neglect or omission, but in a tortious act done by the defendant. The dictum in the books, that if the action arise out of the contract the plaintiff shall not, by declaring in tort, prevent the defendant pleading infancy, must be confined to cases where the wrong

complained of, consists in omission or in some act which is a tort only by construction of law. That was the ground of decision in *Grove v. Nevill* (1 Keb. 778), where in an action upon the case, in nature of a deceit on sale by the defendant of goods as his own, when in truth they belonged to another, the Court said, "This is no *actual* tort, or any thing *ex delicto* but only *ex contractu*." In *Johnson v. Pie*¹, where the defendant had fraudulently asserted himself to be of full age, and had as such executed a mortgage to the plaintiff, and it was holden that the defendant, an infant, was not answerable, the action was founded on the very contract in which the defendant had cheated the plaintiff. Whereas here is a tortious act done by the defendant; and that, too, subsequent to the time when any supposed contract could have been entered into respecting the hire of the mare. An infant is answerable in an action for slander (Noy, 129), because there an act is done by the defendant; and in that case it was said that *malitia supplet aetatem*; so here malice is laid. In trover an infant is also responsible on account of the wrongful conversion subsequent to the bailment; though in most instances in trover the act is only a breach of trust or violation of some duty. And even in an action of trespass for mesne profits he cannot plead infancy; though there he becomes a trespasser by construction of law. If an infant wilfully destroyed anything bailed to him, there is no doubt but that he would be liable in an action for the tort; and this was in effect the same, because here he rendered a mare, that had been bailed to him, less valuable by his wrongful and injurious act.

LORD KENYON, Ch.J. The law of England has very wisely protected infants against their liability in cases of contract; and the present case is a strong instance to shew the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff let him the mare to hire; and in the course of the journey an accident happened, the mare being strained; and the question is whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that, which arises out of a contract, into a tort, there would be an end of that protection which the law affords to infants. Lord Mansfield indeed frequently said that this protection was to be used as a shield, and not as a sword. Therefore if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words "wrongfully, injuriously, and maliciously," introduced into this declaration cannot vary this case.

GROSE, J. I am of the same opinion. In the case of *Manby v. Scott* (1 Sid. 129) this distinction was taken, that if the action against an

¹ 1 Keb. 905, 913; 1 Lev. 169. The judgment is thus reported: "Sed per eum: coment infants serront lie p'actual torts, come trespass, etc., queux sont vi et contra pacem, unc' ne serront lie p' ceux q' sound in deceit, car si serront, tous les infants in Angleterre serront ruine, et in cases lou lour contracts ne eux lie serront ch' come pur tort."

infant be grounded on a contract the plaintiff shall not convert it into a tort; "If one deliver goods to an infant on a contract knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for by that means all infants in England would be ruined."

LAWRENCE, J. The true distinction is that mentioned by my brother Grose, and not that stated at the bar, between negligence and an act done by the infant. It is argued that if no act be done by the infant he may plead his infancy, but that infancy is not a defence where an act has been done. If that were so, an infant would not be liable in many instances of trover, where the conversion consists merely in a non-delivery; and yet in trover an infant is always liable. According to the same rule, if an action were brought against an infant for negligently keeping the plaintiff's cattle by which they died, infancy might be pleaded in bar; but if the declaration charged the defendant with having given the cattle bad food, by which they died, it could not. But this certainly is not the true distinction.

Judgment for defendant.

BURNARD v. HAGGIS.

COMMON PLEAS. 1863.

32 LAW JOURNAL REPORTS, C.P. 189.

[Infant—Tort independent of Contract.]

APPEAL from the County Court holden at Cambridge.

The action was brought to recover the sum of 30*l.* for the damage sustained by the plaintiff by reason of the defendant having caused the death of the plaintiff's horse. The defendant duly pleaded infancy. The plaintiff's attorney having opened the case as a question of contract as well as of tort, the Judge asked the defendant's attorney if he objected to the particulars of the claim (as he thought they pointed rather to tort than to contract). The defendant's attorney replied that he did not object to them; and during the trial it was agreed between the plaintiff's and the defendant's attorneys that the question should go to the jury, whether the contract was for a necessary suitable to the defendant's station in life.

The plaintiff was a livery-stable keeper residing in Cambridge, and the defendant was an undergraduate of Trinity College, Cambridge, whose father was a magistrate for the county of Somerset. The defendant was born on May 23rd, 1842. On March 11th, 1862, the defendant, accompanied by a friend named Bonner, who was also an undergraduate of Trinity College, went into the yard of the plaintiff, to whom both of them were strangers, and the defendant stated that he, the defendant, wanted a horse for a ride. A mare was shewn to him, and he asked if she would jump. The plaintiff said he had no doubt she would, but he did not let her out for jumping or larking, and that if he, the defendant, wanted a horse for jumping plaintiff could shew him a horse for that purpose. The defendant replied that he did not want a horse for jumping, but merely for a ride, and he said he would have the mare. The plaintiff

stated, at the trial, that the usual charge for a ride was 7s. 6d., and that he had charged that sum against the defendant; and that the usual charge for a horse for jumping or larking was a guinea. ^{21 shillings} The defendant stated, at the trial, that he did not tell the plaintiff, or his servant, that he wanted the mare for Mr Bonner. The defendant also stated that, on the same day, he hired a horse of another livery-stable keeper, and that he rode that horse and directed Bonner to ride the plaintiff's mare. Between Cambridge and Grantechester they left the highway and rode together across the fields to the adjoining village of Barton; and in doing so they jumped their horses over several hedges and ditches. On Mr Bonner endeavouring to jump the plaintiff's mare over a fence it fell, and a stake entered its body. The mare died on the 23rd of March from the wound received whilst ridden by Bonner. The jury found that the defendant was an infant under the age of twenty-one at the time of the contract; that the plaintiff did not know that the mare was ridden by Bonner; that the hiring of the mare was a contract for a necessary suitable to the defendant's station in life, and that the amount of damage which the plaintiff had sustained was 30l.

The Judge having directed a verdict to be entered for the plaintiff for 30l. damages, the defendant appealed.

Wills, for the appellant. The horse was not a necessary, and the jury should have been directed to have found a verdict for the defendant.

[BYLES, J. Is not the action here one of tort?]

It was treated at the trial as one of contract. Both parties agreed "that the question should go to the jury whether the contract was for a necessary suitable to the defendant's station." *Jennings v. Rundall* (*supra*, p. 198), shews that an action founded on a contract cannot be converted into one on tort, so as to charge an infant defendant. According to *Bartlett v. Wells* (31 L.J.R. Q.B. 57), an infant, though liable for an actual tort, may plead infancy in bar to an action for a wrong connected with a contract. If this action can be treated as founded on a contract, then it is clear that the hiring of the horse by the defendant cannot be considered a necessary without there were some special circumstances; and if there were such, it was for the plaintiff to shew their existence—*Brooker v. Scott* (11 M. & W. 67), and *Harrison v. Fane* (1 M. & G. 550). ✓

* * * * *

WILLES, J. The act of riding this horse at the fence where it met its death is just as much a trespass as if the defendant without any hiring, and without the plaintiff's leave, had mounted the plaintiff's horse and gone with it into the fields and had there used it as this horse was in fact used. What was done by the defendant was not an abuse of a contract, but was the doing of an act which he was expressly forbidden by the owner to do with the animal.

BYLES, J. I agree that one cannot make an infant liable for the breach of a contract by changing the form of action to one *ex delicto*. This, however, is the case of a horse hired for one purpose and used for another; and, more than that, it was let out to be used by one person and was used by another person; it was let for riding on the road, and

was used for jumping over fences in the fields. There was therefore an independent tort, for which the infant was liable; and it is wholly unnecessary to consider any question about what are necessities.

KEATING, J. The defendant was liable for a tort wholly independent of any contract.

Judgment for respondent.

R. LESLIE, LD. v. SHEILL.

COURT OF APPEAL.

L.R. [1914] 3 K.B. 607.

[*Contract induced by Infant's Fraud.*]

[THE plaintiffs, who were registered moneylenders, sued for the amount of the principal and interest due upon two loans of £200 each; advanced respectively on December 7th, 1911, and December 13th, 1911; as damages because of having been induced to make the loans by the fraudulent misrepresentation of the defendant (who was an infant) that he was of full age. Alternatively they claimed £475 as money had and received by the defendant to the use of the plaintiffs. The jury found that the plaintiffs were induced to make both advances by the fraudulent misrepresentation of the defendant that he was of age. Horridge, J., held against the first claim; but on the latter claim entered judgment for £400 principal for plaintiffs. The defendant appealed.]

Matthews, K.C., for plaintiffs. An infant is liable for pure torts. You may waive a tort and sue for "money had and received"; *Bristow v. Eastman* (1 Esp. 172). There it was held that "money had and received" would lie against an infant to recover money which he had embezzled, though there can be no implied contract in embezzlement.... The Infants' Relief Act, 1874, is limited to contracts. It does not deal with the infant's liability under the equitable doctrine of restitution for fraud. *In re King* (3 De G. & J. 63) decides that a person defrauded by an infant can prove in bankruptcy, because there was a subsisting liability which equity would have enforced....

LORD SUMNER....No action of deceit lay against the appellant, and that claim was abandoned. Nor does the other cause of action fare any better. To the claim for the principal moneys as money had and received to the plaintiff's use, there are at least two answers. The infancy itself was an answer before 1874 at common law; and the Infants' Relief Act, 1874, is an answer now. An action for money had and received against an infant has been sustained where in substance the cause of action was *ex delicto*—*Bristow v. Eastman* cited without disapproval in *Cowern v. Nield* (L.R. [1912] 2 K.B., 419). Even this has been doubted. And where the substance of the cause of action is contractual, it is certainly otherwise. To money had and received, and other *indebitatus* counts, infancy is a defence just as to any other action in contract....

The ground upon which Horridge, J., held the appellant liable was that by reason of his fraud he was compellable in equity to repay the money actually received; and compellable, too, by a judgment *in personam* for the amount, not by any mere proprietary remedy. The rule

in equity has been so stated at times by text-writers, but of authority for it there is very little....

Last year in *Stocks v. Wilson* (L.R. [1913] 2 K.B. 235), an infant, who had obtained furniture from the plaintiff by falsely stating that he was of full age and had sold part of it for £30, was personally adjudged by Lush, J., to pay this £30 as part of the relief granted to the plaintiff. This was the case which more than any other influenced Horridge, J., in the Court below. Lush, J., conceived himself to be merely applying the equitable principle of restitution. The form of the claim was that, by way of equitable relief, the infant should be ordered to pay the reasonable value of the goods; which he could not restore because he had sold them. The argument was, that equity would not allow him to keep the goods and not pay for them; that, if he kept the property, he must discharge the burden; and that he could not better his position by having put it out of his power to give up the property. Lush, J., expressly says, "it is a jurisdiction to compel the infant to make satisfaction;...the remedy is not on the contract." He also said (p. 242): "What the Court of Equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this; and this is a very different thing from making him liable to pay damages or compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled to restore it." But now comes the proposition which applies to the present case and is open to challenge: "If he has obtained money, he can be compelled to refund it." Mr Justice Lush thought that the fundamental principle in *In re King, ex parte Unity J.S.M.B. Association* was a liability to account for the money obtained by the fraudulent representation; and that in the case before him there must be a similar liability to account for the proceeds of the sale of the goods obtained by this fraud. If this were his *ratio decidendi*, though I have difficulty in seeing what liability to account there can be (and certainly none is named in *In re King*), the decision is distinguishable from the present case, and is independent of the above dictum. For in the present case there is clearly no accounting. There is no fiduciary relation. The money was paid over in order to be used as the defendant's own, and he so used it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum; nothing but a judgment in debt to repay the loan. This would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced liability in circumstances like the present any more than a Court of law would have done so. No ground can be found for the present judgment which would be an answer to the Infants' Relief Act.

* * * * *

KENNEDY, L.J....*In re King* ought to be treated as expressing the law in Bankruptcy, and not as expressing a doctrine of general application....

A. T. LAWRENCE, J....*In re King* may be applicable in Bankruptcy but...cannot now be regarded as of general application.

If the cause of action for money had and received existed, I should expect to find ample authority for it. For whenever an honest money-lender lends to an infant, he has probably been deceived as to the age of the borrower.

Appeal allowed.

[EDITOR'S NOTE. In *Watson v. Campbell* (V.L.R. [1920] 347) the Supreme Court of Victoria applied the doctrine, thus established, to shew the non-liability of an infant in an action for breach of promise of marriage, brought by a lady who had been induced to accept him by his fraudulent representation that he was twenty-three years of age.]

DITCHAM v. WORRALL.

COURT OF APPEAL. 1880.

L.R. 5 C.P.D. 410.

[*Promise to marry—Ratification or Fresh Promise.*]

ACTION for breach of promise of marriage. In July, 1875, the plaintiff and defendant mutually agreed to marry each other, both being then under the age of twenty-one; but no time was fixed for the marriage to take place. The defendant attained his majority in December, 1878; and they still continued on the footing of engaged lovers. In March, 1879, the defendant asked the plaintiff, in the presence of her father, to fix the day for the marriage. The plaintiff named the 5th of June. To this the defendant assented. Subsequently, however, the defendant declined to marry the plaintiff, and this action was brought.

No question was left to the jury except as to the amount of damages the plaintiff was entitled to, if the Court should be of opinion that what took place in March, 1879, was evidence from which the jury might and ought to infer a fresh promise, made by the defendant after he attained his majority, as contradistinguished from a mere ratification of the promise made by him during his minority. The jury assessed the damages at 400l....

Digby Seymour, Q.C., for defendant, contended that what passed between the parties in March 1879, was not a new promise, but a mere ratification of the original void promise; that, if it could be construed as a ratification, it must be so construed; and that it was not the less a ratification because under certain circumstances it might be evidence of a fresh promise. *Harris v. Wall* (1 Ex. 22); *Rawley v. Rawley* (L.R., 1 Q.B.D. 465); 9 Geo. 4, c. 14, s. 5.

LINDLEY, J....It is necessary to determine the real meaning of a ratification as distinguished from an independent promise. A ratification necessarily has reference to the past; and, as applied to promises, a ratification is simply an intentional recognition of some previous promise, and a confirmation of such promise with the intention of rendering it binding. A ratification of a voidable promise is a recognition of it and an election not to avoid it but to be bound by it.

There may or may not be any new consideration for a ratification; but there must be a consideration for a new and independent promise.

If, therefore, in any particular case there is no consideration for the alleged ratification, it may be binding as a ratification, but not as a fresh promise. Again, a so-called ratification, which introduces new terms and stipulations, is, at least as to these, a new promise, and is binding as such if there is a consideration to support it, but not otherwise. Where there is a consideration and no new term introduced, the intention of the parties, if clearly expressed, will afford a test whereby to determine whether there has been a new promise or only a ratification. But, where the intention of the parties respecting this particular point is obscure, their words or conduct ought to be so interpreted as to render valid the transaction in which they were engaged, if it is clear that this result at all events was intended by them, and if there is no law rendering such interpretation inadmissible....

The plaintiff's willingness to marry on the day ultimately fixed for the wedding is a sufficient consideration to support a fresh promise by the defendant to marry her on that day. With respect to the intention of the parties, all that is plain is that they considered themselves under an engagement to marry and ultimately intended to marry on the day fixed. Their minds were never addressed to the question of ratification, as distinguished from a fresh promise; and their intentions as expressed by themselves throw no light whatever on the question whether what occurred was actually intended to be a ratification of a previous promise or to be a fresh and independent promise. To hold this case to be one of ratification would be to render the engagement of the parties invalid and not binding, contrary to their manifest intention; whilst, to hold that there was a fresh promise to marry, will be to give effect to that intention. Unless, therefore, the statute forbids such an inference from their conduct, it appears to me that the jury might have found, and ought to have found, that there was a promise by the defendant, after he came of age, to marry the plaintiff on the day ultimately fixed for the marriage, and not a mere ratification of a promise made previously to marry at a day to be thereafter fixed.

In *De Thoren v. Attorney-General* (L.R., 1 App. Ca. 686), a valid Scotch marriage was inferred from habit and repute, although there had been an invalid solemnization of marriage which accounted for the living together of the parties, and to which in fact all their subsequent conduct was referable. In order to give effect to the manifest intention of the parties, the House of Lords held that a subsequent promise to marry ought to be inferred from their conduct. In my opinion the present is a much clearer case, by reason of the fixing of the day for the wedding; for, it is a clear renewal of the original promise with an important addition; and not a mere recognition of such promise and election to abide by it....Where the intention of the parties is obscure, where the so-called new promise is made soon after attaining twenty-one, where it is the consequence of an influence against which it is necessary to guard—in all such cases a jury ought to be warned not lightly to infer a fresh promise as distinguished from a ratification. But the present case is free from all embarrassing considerations of this kind; and the facts of this case were such that, notwithstanding the statute, a jury might properly and

I think ought to have found that there was a fresh promise as distinguished from a ratification.

I am, therefore, of opinion that the verdict and judgment ought to be entered for the plaintiff.

DENMAN, J....It was decided in *Coxhead v. Mullis* (L.R., 3 C.P.D. 439), that s. 2 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), applies to actions for breach of promise of marriage. That case further decided that, where there has been an express promise of marriage during the infancy of a defendant, and the only evidence subsequently is evidence of mere conduct—their treating one another as an engaged couple and keeping company as such—without any evidence of words capable of being construed as a fresh promise, such conduct must be referred to the promise made during infancy, and held to be mere evidence of ratification. But it has also been held, in *Northcote v. Doughty* (L.R., 4 C.P.D. 385), that, where there is evidence not only that the defendant after coming of age and the plaintiff behaved as before, but that the defendant used language capable of being considered as a fresh promise, it is for the jury to find whether the words so used amount merely to evidence of a ratification or prove a fresh promise. In the present case, I think that the words proved to have been used on the occasion on which the defendant asked the plaintiff to fix the day for their marriage, are words amply capable of amounting to a fresh promise to marry, and that on that ground the case ought not to have been withdrawn from the jury....It was a question for the jury whether, under all the circumstances of the case, the language used was merely evidence of a ratification of the promise made during infancy, or evidence of a fresh promise made after full age.

The question, then, being for the jury, I am to say (by consent of the parties) whether the jury ought to have found for the plaintiff or the defendant. No time for the marriage had ever been fixed. It had been spoken of as an event that might not come off for many years. The parties met. The defendant asked the plaintiff to name the day for their marriage. The plaintiff named a particular day. She might then have declined to fix any day. Instead of doing this, she names a day in the presence of her father; and thereupon arrangements are made for a marriage on the day named. This amounts to cogent evidence of a mutual promise to marry one another on the day named; made by both parties after the defendant had attained his full age; and it is not mere evidence of ratification of the promise made three years previously, to marry at some indefinite future period.

LORD COLERIDGE, C.J....It is not every infant of either sex who needs protection, nor at every time. There are infants, as every one knows, abundantly able to take care of themselves; the infant who bought a horse from one dealer and sold it to two others, being paid by both his purchasers without ever paying his vendor, is not a solitary specimen of his class. But Parliament has chosen, for sound and good reasons, to protect infants by legislation from the consequences of their contracts: and there is nothing so capable of destroying the happiness and blasting the usefulness of a whole life, as a foolish and hasty marriage promised

by a girl or boy and enforced upon a man or woman. If Parliament did mean to enact that the marriage contracts of girls and boys should not be made binding upon them as men and women by means only of acknowledgment or ratification, Parliament intended to enact what in my judgment is wise and right....

A very great man¹ has said, "After all, things are what they are, and not other things." If there is a promise in terms, *cadit quaestio*: if there is not, I refuse to hold that, in a practical matter, two people did what (as it is a contract and therefore a question of intention) I am certain they did not do. There was a definite contract between the parties when both were under age; they remained for years upon the footing of engaged lovers; at last it was agreed they should be married at a particular time, and on a definite occasion the parties met, and, the day being named by the plaintiff, the day so named was fixed as the wedding-day. Now, was this a fresh promise to marry made by them to one another? Or was it evidence of a ratification of the promise which they had made several years before? It certainly was not a promise in terms. Was it in law a promise?

In order to ground an action, the promise must be mutual; it must be an agreement, an *aggregatio mentium*, to the same terms at the same time. So that here there must have been an actual present fresh promise to marry one another on the day when, having promised years ago, the woman is asked to fix the day on which the promise is to be fulfilled, and fixes it accordingly....Take some parallel cases. A man makes a binding contract for the purchase of a picture for 100 guineas, no time agreed for its being sent home; he has no space for it for some months; at last he obtains space; he desires that the picture may be sent home, say on the 5th of June: held, I suppose, a fresh purchase and sale of the picture on the day when he calls to name the day! The same law, I presume, of a horse left for a reasonable time in a vendor's stable while arrangements are being made for its reception by the purchaser, and a day afterwards named for its delivery on the completion of such arrangements! And so in a hundred other instances....The consequences are to my mind startling; and such as, till compelled by authority, I am unable to accept. I will not appeal to the common sense of mankind, and ask whether any man and woman who fix their wedding-day do in fact think that they are then promising over again and afresh to marry one another; because I have most unfeigned respect for the sense of my learned Brothers, and their sense and mine have come on this question of fact to totally opposite conclusions. I can but fall back upon the saying already quoted, "things are what they are, and not other things"; and affirm that in my judgment (where there is an actual subsisting and acknowledged contract to marry) a promise to marry is one thing, and fixing the day when the promise is to be performed is another thing.

On the other hand, what happened in this case appears to me exactly to fulfil the definition of a ratification—*Ratihabitio est consensus qui*

¹ [EDITOR'S NOTE. "Things and actions are what they are; and the consequences of them will be what they will be. Why then should we desire to be deceived?" Bp. Butler's *Sermons at the Rolls*, No. vii.]

negotium perfectum insequitur. Here, the negotium, the contract, was long since perfectum. It had been completed years before; it was ratified in the strongest way when the day for its execution was ascertained. I am therefore of opinion that in this case there should be a nonsuit and judgment for the defendant....

Judgment for plaintiff.

[EDITOR'S NOTE. In *Holmes v. Brierley* (36 W.R. 693) a Divisional Court—although personally preferring the dissentient judgment of Lord Coleridge—recognised the decision of the majority in *Ditcham v. Worrall* as a binding authority; and pointed out that the fixing of the marriage day, by introducing a new term, afforded evidence of a new promise. The question is one of Fact, and therefore for the jury. But if the evidence be just as consistent with a mere intention to ratify an old promise as with the intention to make a new one, the case ought to be withdrawn from the jury..

In *Watson v. Campbell* (V.L.R. [1920] 347) the Supreme Court of Victoria found evidence of a fresh promise in the fact that the defendant, after attaining his majority, induced the lady to enter into an arrangement by which, instead of their marriage taking place in Scotland as originally agreed, she should come to Australia and marry him there.]

SECTION III

CORPORATIONS

ASHBURY RAILWAY CARRIAGE AND IRON COMPANY LD. v. RICHE.

HOUSE OF LORDS. 1875.

L.R., 7 E. & I. APPEALS, 653.

[*Companies Act, 1862—Ultra Vires.*]

LORD CAIRNS, L.C....The action was brought by the plaintiffs, Messrs Riche, who appear to be contractors in Belgium, for damages for the breach of an agreement entered into between the plaintiffs and the shareholders, constituting the Ashbury Railway Carriage and Iron Company, Limited.

These persons constituted a company established under the Joint Stock Companies Act of 1862. The purposes for which a company, established under the Act of 1862, is formed, are always to be looked for in the Memorandum of Association of the company. According to that Memorandum this company is formed for these objects—"to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents." Part of the argument was as to the meaning of two of the words used in this part of the memorandum—the words "general contractors." Upon all

ordinary principles of construction those words must be referred to the part of the sentence which immediately precedes them....“To carry on the business of mechanical engineers and general contractors,” is the specification of an object complete in itself; and, according to the principles of construction, the term “general contractors” would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers....If the term “general contractors” were not to be interpreted as I have suggested, the consequence would be that it would stand absolutely without any limit of any kind. It would authorize the making, therefore, of contracts of any and every description, and the memorandum in place of specifying a particular kind of business would virtually point to the carrying on of business of any kind whatever, and would therefore be altogether unmeaning.

I now turn to examine the contract upon which the present action is brought. The substance of the contract upon which the action was brought (and two other contracts which are inseparably connected with it) was this. Gillon and Baertsoen had obtained the right to make a railway in Belgium. This right the defendants' directors supposed to be valuable to its owners; that is to say, the line could be constructed for a certain sum, and a *société anonyme* could be constituted with shareholders to take its shares to an amount which would give a large sum over the cost of construction. The benefit of this the directors desired to obtain for the defendant company, and to do so purchased the concession. This was their main object. But the plaintiffs held a contract with the concessionaries to construct the line. To accomplish the directors' object it was desirable that they should agree with the plaintiffs that the defendants should constitute a *société anonyme*, and, as the plaintiffs went on with the work, the defendants should pay into the hands of the *société* proportionate funds. The directors accordingly entered into two contracts in the defendants' name—one with the concessionaries to purchase the concession; the other with the plaintiffs to furnish the *société anonyme* with funds, the latter contract being auxiliary to the former. They paid to the concessionaries £26,000, part of the price. Now, whatever may be the meaning of “carry on the business of mechanical engineers and general contractors,” it clearly does not include the making of either of these contracts. It could only be held to do so by holding that the words “general contractors” authorized generally the making of any contracts; and this they certainly do not....A contract of this kind was not within the words of the memorandum of association. It was not a contract in which, as the memorandum of association implies, the limited company were to be the employed, they were the employers. They purchased the concession of a railway—an object not at all within the memorandum of association; and having purchased that, they employed (or they contracted to pay, as persons employing) the plaintiffs in the present action, as the persons who were to construct it. That was reversing entirely the whole hypothesis of the memorandum of association.

Those being the results of the documents, I now consider the effect

of the Joint Stock Companies Act of 1862 on this state of things. This is the Act which put upon its present permanent footing the regulation of joint stock companies, and more especially of those joint stock companies which were to be authorized to trade with a limit to their liability. The provisions under which that system of limiting liability was inaugurated, were provisions not merely for the benefit of the shareholders for the time being in the company, but were intended also to provide for the interest of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind. Two documents form the title deeds of companies of this description—the Memorandum of Association on the one hand, and the Articles of Association on the other hand. The memorandum of association is, as it were, the charter; and defines the limitation of the powers of a company to be established under the Act. The articles of association play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company; and proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large; the mode and form in which the business of the company is to be carried on; and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company.

The sixth clause of the statute provides that "Any seven or more persons¹ associated for any lawful purpose may, by subscribing their names to a memorandum of association, or otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without limited liability." It does not speak of the incorporation as the creation of a corporation with inherent common law rights, such rights as are by common law possessed by every corporation, and without any other limit than would by common law be assigned to them. It speaks of the company being incorporated with reference to a memorandum of association; you are referred thereby to the provisions which subsequently are to be found upon the subject of that memorandum of association.

The eighth clause says: "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the

¹ [EDITOR'S NOTE. The Companies Consolidation Act, 1908, s. 2, adds: "or, where the company to be formed will be a Private Company...any two or more persons"; but, except for this addition, corresponds with the clause above quoted.]

Memorandum of Association shall contain the following things" (I pass over the first and second, and come to the third item which is to be specified): "The objects¹ for which the proposed company is to be established."...The existence, the coming into existence, of the company is to be an existence, and a coming into existence, for those objects and for those objects alone.

By the 11th section²: "The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least.... It shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this Act." Every member of the company is to covenant that he will observe the conditions of the memorandum, one of which is that the objects for which the company is established are the objects mentioned in the memorandum; and that he not only will observe that, but will observe it subject to the provisions of this Act. Well, but the very next provision of the Act contained in the 12th section³ is this: "Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner herein-after mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock. But (save as aforesaid, and save as is hereinafter provided in the case of a change of name), no alteration shall be made by any company in the conditions contained in its memorandum of association." The covenant, therefore, is not merely that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions. And if there is a covenant that no change shall be made in the objects for which the company is established, I apprehend that that includes within it the engagement that no object shall be pursued by the company, or attempted to be attained by the company, in practice, except an object which is mentioned in the memorandum of association.

If that is the condition upon which the corporation is established—if that is the purpose for which the corporation is established—it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of

¹ [EDITOR'S NOTE. The Act of 1908, s. 3, is to a similar effect: "(iii) The objects of the company."]

² [EDITOR'S NOTE. Reproduced in s. 6 and s. 14 (1) of the Act of 1908.]

³ [EDITOR'S NOTE. The Act of 1908 is rather laxer; s. 7 provides that "A company may not alter the conditions contained in its Memorandum; except in the cases and in the mode and to the extent for which express provision is made in this Act." The mode is, by a Special Resolution, confirmed by whatever Court would have jurisdiction to wind up the company.]

vitality and power which by law are given to the corporation; and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit; and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified.

Now with regard to the Articles of Association, the character of the legislation is completely different. The 14th section deals with those articles: "The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association, signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." They are to be the masters of the regulations which (always keeping within the limit allowed by law) they may deem expedient for the internal regulation of the company. The 50th section of the Act provides that "Subject to the provisions of this Act, and to the conditions contained in the memorandum of association, any company formed under this Act may, in general meeting, from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the Articles of Association, or in the table marked A in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of, or in addition to, all or any of the regulations of the company." Of the internal regulations of the company the members of it are absolute masters. Provided they pursue the course marked out in the Act—that is to say, holding a general meeting and obtaining the consent of the shareholders—they may alter those regulations from time to time. But all must be done in the way of alteration subject to the conditions contained in the memorandum of association. *That is to override and overrule any provisions of the Articles which may be at variance with it.* The memorandum of association is, as it were, the area beyond which the action of the company cannot go. Inside that area the shareholders may make such regulations for their own government as they think fit.

That reference to the Act will enable me to dispose of a provision in the articles of association in the present case which I refer to in order that it may not be supposed to have been overlooked. There has come into the articles of association of this company one which is in these words: "An extension of the company's business beyond or for other than the objects or purposes expressed or implied in the memorandum of association shall take place only in pursuance of a special resolution." In point of fact, no resolution for the extension of the business of the company was in this case come to. But even if it had been come to, it would have been entirely inept and inefficacious. There was, in this article, an attempt to do the very thing which, by the Act of Parliament, was prohibited to be done—to claim and arrogate to the company a power, under the guise of internal regulation, to go beyond the objects or purposes expressed or implied in the memorandum.

Now, bearing in mind the difference between the Memorandum and the Articles, we arrive at all which appears to me to be necessary for

the purpose of deciding this case. I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used—the expression “illegality.” In a case such as this it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, “That is a contract which we desire to make; which we authorize the directors to make; to which we sanction the placing of the seal of the company,” the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

But if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact been made?...It would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the whole company could not do; and that then, the shareholders, finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized....On the true construction of the statute of 1862, it appears that it was the intention of the Legislature, not implied but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, every court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, as *extra vires*, and wholly null and void. A contract wholly void cannot be ratified....If ratification had to be considered I have found in this case no evidence which to my mind is at all sufficient to prove ratification; but I do not wish to found my opinion on any question of ratification. This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation.

Some cases have been referred to here—those arising out of the *Agriculturist Cattle Insurance Company* (L.R. 3 H.L. 171, 249, 263), and *Phosphate of Lime Company v. Green* (L.R. 7 C.P. 43)—as bearing on the present question. They illustrate extremely well, what I have said just now, that the articles of association of a company of this kind are the documents which define the power of directors as between themselves and the company. In those cases the whole question was, whether the directors had gone beyond the powers by which their authority was limited under the articles of association. In no one of those cases was there any

question as to whether the power of the whole company had been exceeded. In the cases of the *Agriculturist Cattle Insurance Company*, no person ever doubted that if the shareholders had assembled together they might have released from the obligation of a partnership contract *inter se* (for there was no question of outside creditors) any member of the company upon any terms that they thought fit. The only question was whether the directors had released those who were released upon terms which they were authorized to make, or whether, if they had not released them upon such terms, the release subsequently became known to the company and was sanctioned by the company. The shareholders might have passed a resolution sanctioning the release, or altering the terms in the articles of association upon which releases might be granted. If they had sanctioned what had been done without the formality of a resolution, it was quite clear that that would have been perfectly sufficient. So also in the case of the *Phosphate of Lime Company* the question was, whether that had been done by the sanction of the company which clearly might have been done by a resolution passed by the company. Those cases have no application whatever to the present case. It stands upon the power, not of the directors alone, but of the whole company as settled by the Act of Parliament.

[Lord Chelmsford, Lord Hatherley, Lord O'Hagan and Lord Selborne delivered concurring judgments.]

*Judgment for defendants*¹.

[EDITOR'S NOTE. This decision established the fundamental principle that a company created by Registration can only act within its defined limits, unlike a company incorporated by Charter. The latter, though only an artificial person, can do all the acts which a natural person can do (*Case of Sutton's Hospital*, 10 Coke Rep. 13). But the principle established in Riche's Case must nevertheless "be reasonably understood and applied; and whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held to be *ultra vires*." (*Per* Lord Selborne, L.C. 5 App. Ca. at p. 478).]

SECTION IV

LUNATIC AND DRUNKEN PERSONS

THE IMPERIAL LOAN CO. v. STONE.

COURT OF APPEAL. 1892.

L.R. [1892] 1 Q.B. 599.

[*Lunatic—Knowledge by the Other Party.*]

THE action was brought on a promissory note which the defendant (who had since the making of the note been found by inquisition to be a lunatic) signed as surety....

¹ Cf. *Att.-Gen. v. Great Eastern Ry. Co.* (5 App. Cas. 473, 481), where Lord Blackburn referring to the case above reported said: "That case appears to me to decide that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or implicitly authorize is to be taken to be prohibited."

Denman, J., left to the jury the questions whether the defendant, when he signed the note, was so insane as not to be capable of understanding what he did, and whether this incapacity was known to the agent of the plaintiffs, who was present when the note was signed. The jury found that the defendant was insane when he signed the note; but they could not agree upon the question as to the knowledge of the plaintiffs' agent. The judge entered a verdict for the defendant. The plaintiffs applied for judgment or for a new trial....

Witt, Q.C., for the defendant. There is no authority that a man can be sued and made liable on an executory contract which he was incapable of understanding by reason of insanity. There are cases in which a contract for necessities has been enforced; but there is an implied contract to pay in such cases arising from the circumstances; *Gore v. Gibson* (13 M. & W. 623). There is a distinction between executed and executory contracts, between getting back money already paid and avoiding liability to pay it: *Valentini v. Canali* (*supra*, p. 197). If the mind does not go with the act, that is sufficient to release the defendant from liability on a contract, whatever the cause of incapacity: *Foster v. Mackinnon* (*infra*, p. 223). In *Drew v. Nunn* (4 Q.B.D. 669), Bramwell, B., says: "If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting"; so that when total incapacity is proved, there is no contract on which to proceed. The contract of suretyship is one which "should be based upon the free and voluntary agency of the individual who enters into it"; *Williams v. Bayley* (L.R. 1 H.L. 219). It cannot be said that the act of an insane person in making such a contract could be so described.

When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it; unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about....The burden of proof, in such a case, must lie on the defendant.

FRY, L.J....In *Beverley's Case* (4 Coke Rep. 123*b*), the Court laid down, that "every deed, feoffment, or grant, which any man non compos mentis makes, is avoidable; and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself."...Therefore, although persons who claimed under one who was non compos mentis, could set up the disability, the man himself could not. In *Molton v. Camroux* (2 Ex. 487), Pollock, C.B., said the rule had in modern times been relaxed; and unsoundness of mind would now be a good defence to an action upon a contract, if it could be shewn that the defendant was not of capacity to contract, "and the plaintiff knew it"; he referred to *Baxter v. Earl of Portsmouth* (5 B. & C. 170). It thus appears that there has been grafted on the old rule the exception that the contracts of a person who is non compos mentis may be avoided when his condition can be shewn to have been known to the plaintiff. So far as I know, that

is the only exception. The question whether that knowledge exists has not been determined in this case, and consequently we cannot say that the exception applies; and judgment could not properly be entered for the defendant. There must, therefore, be a new trial.

Order for new trial.

MATTHEWS v. BAXTER.

EXCHEQUER. 1873.

L.R. 8 Ex. 132.

[*Contract by Drunken Man—Ratification.*]

DECLARATION for breach of contract in not completing the purchase of houses and land bought of the plaintiff at a sale by auction.

Plea, that at the time of making the alleged contract, the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew.

Replication, that after the defendant became sober, and able to transact business, he ratified and confirmed the contract.

Demurrer and joinder.

Manisty, Q.C. (*Hills* with him), in support of the demurrer. The contract of a man, who was totally drunk and incapable at the time, is not voidable merely, but void: *Gore v. Gibson* (13 M. & W. 623). It cannot therefore be ratified. *Molton v. Camroux* (2 Ex. 487), which may be relied on by the plaintiff, only proves that where a lunatic's or drunkard's contract is executed, and the parties to it cannot be replaced in statu quo, such a contract cannot afterwards be set aside. In the present case the contract is executory, and the parties to it can be replaced in their original position.

KELLY, C.B. I am of opinion that our judgment must be for the plaintiff. It has been argued that a contract made by a person who was in the position of the defendant, is absolutely void. But it is difficult to understand this contention. For, surely, the defendant, upon coming to his senses, might have said to the plaintiff, "True, I was drunk when I made this contract, but still I mean, now that I am sober, to hold you to it." And if the defendant could say this, there must be a reciprocal right in the other party. The contract cannot be voidable only as regards one party, but void as regards the other; and if the drunken man, upon coming to his senses, ratifies the contract, I think he is bound by it.

* * * * *

POLLOCK, B. The case of *Gore v. Gibson* was no doubt rightly decided, but some of the dicta of the judges cannot be supported in all their fulness since the decision in *Molton v. Camroux*. I think the contract of a drunken man is voidable and not void.

Judgment for plaintiff.

[EDITOR'S NOTE. In *Bawlf Grain Co. v. Ross*, in 1917, (55 Canada 232) the Supreme Court of Canada held that a drunken man must be held to have ratified the contract if he do not repudiate it within a reasonable time. "That nothing is done to affirm the contract, is not enough to avoid it; it must be disaffirmed." The analogy of Fraud, as in *Deposit Life Assurance v. Ayscough* (*infra*, ch. v. s. iii) was relied upon. The American decisions are to the same effect; "failure to disaffirm within a reasonable time amounts to a ratification. If goods are bought when drunk and kept when sober, the buyer must pay the price"; (Williston on Contracts, § 261).]

SECTION V

MARRIED WOMEN

SANKY *alias* WALGRAVE v. GOLDING.

CHANCERY. 1580.

CARY, 124.

[*Married woman suing alone—Separate estate.*]

THE plaintiff setteth forth in her bill, that she joined with her husband in sale of part of her inheritance; and after, some discord growing between them, they separate themselves; and one hundred pounds of the money received upon sale of the lands was allotted to the plaintiff for her maintenance, and put into the hands of Nicholas Mine, Esquire, and bonds then given for the payment thereof unto Henry Golding, deceased, to the use of the plaintiff. Which bonds are come to the defendant, as administrator to the said Henry Golding, deceased, who refuseth to deliver the same to the plaintiff, and hereupon she prayeth relief. The defendant doth demur in law, because the plaintiff sueth without her husband; and it is ordered the defendant shall answer directly.

[EDITOR'S NOTE. By this decision (given during Sir Thomas Bromley's chancellorship, Chancery initiated a sweeping departure from the Common Law doctrine of Conjugal Unity; and established the possibility of a wife's possessing Separate Estate, as if unmarried. It is an interesting coincidence—if indeed it be only a coincidence—that both this change in the judiciary law and also its statutory counterpart, the reform effected by the Married Women's Property Act, 1882, were effected in female reigns.

The reader will have noticed that in the case which established the new doctrine (1) the married couple had ceased to live together, and (2) a third person had been made trustee of the common-law interest in the property. But the doctrine soon outgrew both these limitations; and came to be applied even where a husband and wife were cohabiting and where no trustee had been interposed. See Kenny's *History of the Law of Married Women's Property*, pp. 99-103.]

SCOTT v. MORLEY.

COURT OF APPEAL. 1887.

L.R. 20 Q.B.D. 120.

[*Married Woman—Order of Committal.*]

APPEAL by Julia Morley, the wife of Samuel Morley, against an order upon a judgment summons, that she should be committed to prison for six weeks for non-payment of 291*l.* 11*s.* 9*d.*, the amount of the plaintiff's judgment debt and costs.

The action was brought in the Queen's Bench Division against Samuel Morley and Julia Morley, his wife, by a creditor of the wife in respect of a debt contracted by her while she was a married woman. The writ was not served on the husband. The wife appeared to the writ. An order was made in chambers giving the plaintiff leave to sign judgment under Order XIV. r. 1, for the amount indorsed on the writ, with interest and costs, unless the amount of the plaintiff's claim should be paid into

Court on or before April 15th, 1887, or security given within that time. The order directed that execution should be limited to the separate estate of the wife not subject to any restraint on anticipation (unless, by reason of s. 19 of the Married Women's Property Act, 1882, such estate should be liable to execution notwithstanding such restraint). The wife did not within the time limited either pay the amount into Court or give security for the same, and the plaintiff signed judgment against the defendant for 27*l.* 8*s.* 9*d.*, and 13*l.* 3*s.* the amount of his taxed costs, execution being limited as above stated.

Reed, for the judgment creditor. At common law a married woman was liable to be arrested under a *ca. sa.*¹, when she had pleaded coverture and had failed to prove her plea, or when she had omitted to plead it; and if she was arrested the Court would release her unless she had separate property from which she could pay the debt. In *Poole v. Canning* (L.R. 2 C.P. 241) a married woman, sued as a feme sole for goods sold, pleaded coverture, but offered no evidence at the trial in support of her plea. She was arrested under a *ca. sa.* on the judgment, and the Court held that she was not entitled to her discharge.

In order that s. 5 should apply it is not necessary that there should be a debt in respect of which an action could be brought; it is sufficient if there is a sum due upon a judgment of a Court: *Linton v. Linton* (L.R. 15 Q.B.D. 239). In the present case the judgment is recovered against the wife, though execution is limited to her separate estate....

Before the Married Women's Property Act, 1882, the separate property of a married woman could be made available in equity to satisfy her engagements.

[FRY, L.J. I do not think she could have been attached for contempt if she had not paid out of her separate estate a sum which had been charged upon it by a decree of a Court of Equity.]

If she was in receipt of a separate income the Court would have compelled her to pay. Sub-s. 2 of s. 1 of the Married Women's Property Act, 1882, provides that a married woman "shall be capable of rendering *herself* liable to the extent of her separate property on any contract." She is made personally liable—*i.e.*, a debtor—to the extent of her separate property. If she can only bind her separate property, the Act has not enabled her to do anything which she could not have done before. Since the Judicature Act it is a matter of procedure whether the remedy is at law or in equity.

* * * * *

LORD ESHER, M.R....Up to the Married Women's Property Act, 1882, a married woman could be taken in execution upon a judgment recovered after her marriage against her and her husband in respect of a contract made by her before marriage, and also upon a judgment recovered against

¹ [EDITOR'S NOTE. *I.e.* a *Capias ad satisfaciendum*; which was a writ bidding the sheriff seize the body of the debtor, so that he might satisfy the plaintiff's claim, or else remain in custody until he did so. But by the Debtors Act, 1869, imprisonment for civil debts is now practically limited to cases of *wilful* non-payment of a judgment debt.

her and her husband in respect of a wrongful act done by her during the marriage. But neither at law nor in equity was she liable to be taken in respect of a contract made by her during marriage. It seems to me that the Act of 1882 does not alter the legal liability of a married woman at all. It does not prevent the bringing of an action against a husband and wife in respect of a contract made by the wife before marriage, and it does not affect the case of a wrongful act committed by a woman during marriage, and, where at common law a married woman was liable to be taken under a *capias ad satisfaciendum*, in such cases she can now be summoned under s. 5 of the Debtors Act, 1869, and be dealt with accordingly.

But then arises the question, what is now the position of a married woman in respect of a liability to which she was not subject at common law, but which has been imposed on her solely by the Married Women's Property Act, 1882? The liability is imposed by sub-s. 2 of s. 1 of that Act, which provides that "a married woman shall be capable of entering into and rendering herself liable on any contract." That must mean that a woman shall after she is, and whilst she is, married, be capable of entering into and rendering herself liable upon any contract. She could enter into a contract before the Act, and therefore the Act must mean that she shall be capable of entering into a contract so as to render herself liable upon it. A liability is thus imposed on her which did not exist either at law or in equity before the Act. If sub-s. 2 had stopped there, I should have thought that the same consequences would follow as in the case of a contract entered into by a *feme sole*....But, if a remedy is given by the statute which imposes the new liability, that must be the only remedy. Sub-s. 2 goes on to provide that the woman shall be capable of rendering herself liable "in respect of and to the extent of her separate property," and "of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her" (that again alters the law); "and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

That is, the damages recovered are not to be payable by the married woman; they are to be payable out of her separate property....This section really imposes a new liability on a married woman at law, which will produce the same result as was before the Act produced in equity. In equity the decree was that the sum found due should be charged on the married woman's separate estate, and the same effect is, as it seems to me, given by the Act to an action at law as was before the Act produced in equity by a different process.

If this be so, does s. 5 of the Debtors Act, 1869, apply to a judgment of this nature? Sect. 5 says that the Court may commit to prison any person who makes default in payment of "any debt due from him" in pursuance of any order or judgment of the Court. What is the real meaning of those words "due from him"? It appears to me that they point to a debt which the defendant is personally liable to pay. If you treat

the Debtors Act as an Act which authorizes the Court to commit people to prison, then you must construe it strictly. It is a highly penal Act, affecting the liberty of the subject, and you must not say that a sum which is payable only out of a person's property is a sum "due from" that person. If, on the other hand, you treat the Act as a remedial Act, then it only enables the Court to modify the imprisonment which could have been inflicted at common law, so as to prevent it from being so large as it was at law before the Act; and, treating the Act in that way, s. 5 cannot apply to such a case, because there was nothing to modify, there being no power to arrest a married woman before the Act. In either view of the Act, it appears to me that s. 5 of the Debtors Act does not apply to the judgment which can be recovered against a married woman only by virtue of the Married Women's Property Act, 1882.

Our present decision applies merely to judgments which can be recovered against a married woman only by virtue of the Act of 1882, and it does not apply to judgments which could have been recovered against a married woman at common law before that Act.

BOWEN, L.J....When an Act is dealing with the liberty of the subject we ought to be very careful not to read into it words which are not to be found there, and which would derogate from the liberty of the subject. Now s. 5 of the Debtors Act gives power to commit a person who makes default in payment of any debt "due from him." Can it be said that, when a judgment directs a sum to be paid out of a married woman's separate property, it creates a debt "due from her," as to which she can make default in payment? In my opinion, if we were so to hold, we should be straining the language of s. 5. The debt under such a judgment is only "due from" the married woman *sub modo*; it is only payable out of her separate property....

FRY, L.J....If the Act of 1882 had been passed before the Act of 1869, could a *ca. sa.* have been issued against a married woman upon such a judgment? In my opinion, it could not, and for this simple reason, that the judgment is limited to a particular fund, and creates no general personal liability....Those who ask the Court to commit a person to prison are bound to shew the jurisdiction to do so. In the absence of clear words to that effect, it must not be assumed that the legislature have created a new power of committal. It appears to me that the object of the legislature in the Act of 1882 was to facilitate the recovery of debts out of the separate property of married women, and not to enlarge the then existing power of committal for debt.

Appeal allowed.

CHAPTER V

REALITY OF CONSENT

SECTION I

MISTAKE

FOSTER v. MACKINNON.

COMMON PLEAS. 1869.

L.R. 4 C.P. 704.

[Indorsement obtained by fraudulent representation.]

ACTION by indorsee against indorser on a bill of exchange for 3000*l.* drawn on the 6th of November, 1867, by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed successively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value before it became due, and without notice of any fraud. The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his handwriting, and that he had never accepted nor indorsed a bill of exchange. But there was evidence that the signature was his; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement. Callow had been secretary to a company engaged in the formation of a railway in which the defendant was interested; and the defendant had some time previously, at Callow's request, signed a guarantee for 3000*l.*, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it, telling him it was a guarantee. Whereupon the defendant, in the belief that he was signing a guarantee similar to that which he had before given, put his signature on the back of the bill. Callow only shewed the defendant the back of the paper; it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

Bovill, C.J., told the jury that (1) if the indorsement was not the signature of the defendant; or (2) if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and he signed it without knowing that it was a bill, and under the belief that it was a guarantee, and was not guilty of any negligence in so signing the paper; he was entitled to the verdict.

The jury returned a verdict for the defendant. The plaintiff obtained a rule nisi for a new trial; on the grounds of misdirection and that the verdict was against evidence.

Sir J. D. Coleridge, in support of the rule.

(1) The fact that the defendant's indorsement on the bill was obtained by a fraudulent representation that he was signing something else, is no answer to the claim of a *bonâ fide* holder for value, without notice of the fraud. No doubt, as a general rule, fraud vitiates all contracts. But a bill of exchange is not in the ordinary sense of the word a contract at all. Bills of exchange now form an important part of the currency of the country. No matter how a bill or note may be tainted with fraud, or even if it has been obtained by duress or by felony, that is no answer to an action at the suit of a *bonâ fide* holder for value.... Wherever there is consideration, fraud may be disregarded. If a stolen bill gets into circulation, the acceptor is liable at the suit of a *bonâ fide* holder for value. This was not a case of forgery: it was a mere fraudulent procurement of the defendant's signature to a genuine and a complete bill....

(2) The verdict was clearly against the weight of evidence upon the question of negligence. Can it be said that it was any other than gross negligence on the part of the defendant to put his name upon the back of a document such as that described, without even looking at the face of it. If anyone is to suffer from his misplaced confidence in Callow, it surely must be the defendant himself.

BYLES, J....The case presented by the defendant is, that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended¹.

¹ [EDITOR'S NOTE. Hence where a Chinaman who knew English only very imperfectly, signed a lease under the impression that he was only signing a letter of introduction, the Supreme Court of Victoria held the lease to be void; though there had been no fraud or misrepresentation; *Lee v. Ah Gee* (V.L.R. [1920] 278). If a man's conduct gives every outward manifestation that he is agreeing with the other contracting party, so that a reasonable man, placed in that latter party's position, would conclude without any reasonable doubt that the former was agreeing, the former will be estopped from saying that he did not agree. But Ah Gee's ignorance of English would have led any reasonable man to feel "he may be understanding me—or he may not be." Hence Lee, by proceeding in this uncertainty, took the risk; so that the Chinaman was not estopped.]

The authorities appear to us to support this view of the law. In *Thoroughgood's Case* (2 Co. Rep. 9b), it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed....It has recently been decided in the Exchequer Chamber, that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor: *Swan v. North British Australasian Land Company* (2 H. & C. 175).

These cases apply to deeds; but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity; and liable to the extent of any sum which the stamp will cover. In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But, in the case now under consideration, the defendant, according to the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design (and, if he were guilty of no negligence, it was not even his fault) that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case, the signer would not have been bound by his signature, for two reasons—first, that he never in fact signed the writing declared on—and, secondly, that he never intended to sign any such contract.

In the present case, the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument.

For these reasons, we think the direction of the Lord Chief Justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. The rule, therefore, will be made absolute for a new trial.

Rule absolute.

[EDITOR'S NOTE. In *Carlisle and Cumberland Banking Co. v. Bragg* (L.R. [1911] 1 K.B. 489) the Court of Appeal considered that what is said in *Foster v. Mackinnon*, as to the possibility of estoppel by negligence, must be limited to the case of negotiable instruments (like the promissory note there dealt with); cf. *Swan v. North British A. L. Co.* The law-merchant, to guard the circulation of such documents, imposes on the maker of one a duty towards every future holder.

Bragg had been induced by the fraud of Rigg to sign, without reading it, a guarantee to the plaintiffs of Rigg's banking account with them; Rigg representing it to him as being only an insurance paper. Bragg was neither blind nor illiterate. The jury found Bragg to have acted negligently. The judgment of Pickford, J., for the defendant was, on appeal, upheld unanimously. Bragg was under no duty of diligence towards the bank; moreover the *proximate* cause of the bank's loss was Rigg's use of the guarantee. The student should, however, read Sir W. Anson's criticism of this case in the *Law Quarterly Review*, xxviii. 190.]

CUNDY AND BEVINGTON v. LINDSAY AND OTHERS.

HOUSE OF LORDS. 1878.

L.R. 3 APP. CA. 459.

[Sale of goods—Error as to Identity of purchaser.]

ALFRED BLENKARN hired a room at a corner house in Wood Street, Cheapside—it had two side windows opening into Wood Street; but the entrance was from Little Love Lane, though it was by him constantly described as 37, Wood Street, Cheapside. His agreement for this room was signed "Alfred Blenkarn." Messrs Lindsay & Co., were linen manufacturers, carrying on business at Belfast. In the latter part of 1873, Blenkarn wrote to them on the subject of a purchase from them of goods—chiefly cambric handkerchiefs. His letters were written as from "37, Wood Street, Cheapside," where he pretended to have a warehouse. The name signed to these letters was always signed without any initial representing a Christian name; and was, besides, so written as to appear "Blenkiron & Co." There was a respectable firm of W. Blenkiron & Son, carrying on business in Wood Street—but at number 123, Wood Street, and not at 37. Messrs Lindsay, who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs Blenkiron & Co., 37, Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. Blenkarn sold the goods, thus fraudulently obtained, to different persons; and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs Cundy, who were bonâ fide purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the Mayor's Court of London by Messrs Lindsay, as
so against Alfred Blenkarn, and in the affidavit of debt named him as the

debtor. Blenkarn's fraud was soon discovered, and he was prosecuted at the Central Criminal Court, and convicted and sentenced. Messrs Lindsay then brought an action against Messrs Cundy for unlawful conversion of the handkerchiefs. Blackburn, J., left it to the jury to consider (1) whether Alfred Blenkarn, with a fraudulent intent to induce the plaintiffs to give him the credit belonging to the good character of Blenkiron & Co., wrote the letters, and by fraud induced the plaintiffs to send the goods to 37, Wood Street; (2) were they the same goods as those bought by the defendants; and (3) did the plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt Alfred Blenkarn as their debtor. The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the defendants, with leave reserved to move to enter the verdict for the plaintiffs. On motion accordingly, the Court (L.R. 1 Q.B.D. 348) directed judgment to be entered for the defendants. On appeal, this decision was reversed (L.R. 2 Q.B.D. 96) and judgment entered for the plaintiffs, Messrs Lindsay. This appeal was then brought.

Sir H. S. Giffard, for the appellants. The property in the goods passed from the respondents to Blenkarn. A title to goods may be acquired even where they are obtained upon false pretences. Though voidable, it will, as to third persons at least, be good till it has been avoided. It must in some sense pass the property, for if it did not, it may be doubtful whether a conviction for obtaining the goods could be sustained. Here it is clear that there was in the first instance an intention on the part of the original owner that the property should pass to some person in Wood Street....The plaintiffs themselves sent the goods to the person who had corresponded with them, and who did carry on business at 37, Wood Street. The goods were delivered there according to the address which the plaintiffs had put upon them. The original owner allowed the goods to remain in the hands of the person to whom he had sent them; and while there they were sold to the defendants, who were *bonâ fide* purchasers for value. After that the vendor could no longer follow them as his own; his intention had been to transfer them, and the transfer was complete....It was not a delivery to *B*, who stated himself to be the agent of some one else when he was not so; it was a delivery to *B* himself. Credit was given to Blenkarn & Co., of 37, Wood Street. Then again, in the first instance, the affidavit of debt shewed that the house recognised Blenkarn as the debtor. That, though not conclusive on the subject, was at least strong evidence of previous intention. Where the authority to part with the property is limited, and the property is parted with in disregard of that limited authority, the title to it would not pass: *Reg. v. Middleton* (L.R. 2 C.C.R. 38); but here the goods were transmitted by the owners themselves to a person and a place described by themselves. The title to the goods was for the time perfect in law, and, being so, the transfer to the defendants made during that time, being made *bonâ fide*, could not be impeached: *Pease v. Gloaghe* (L.R. 1 P.C. 219). Till the title of Blenkarn was disaffirmed it was good; and the property disposed of in the meantime could not afterwards be followed in the hands of a third person who had honestly purchased it.

LORD CAIRNS, L.C....By the law of our country the purchaser of a chattel takes the chattel (as a general rule) subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world. But if he does not purchase the chattel in market overt, and if the chattel has been found, or stolen, by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If the chattel has come into the hands of the person, who professed to sell it, by a *de facto* contract—that is to say, a contract which has purported to pass the property to him from the owner of the property—there the purchaser will obtain a good title; even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner to reduce it and set it aside. Because these circumstances will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs Lindsay to Alfred Blenkarn? If there was, (even although that contract might afterwards be open to reduction, upon the ground of fraud), still, in the meantime, Blenkarn might have conveyed a good title for valuable consideration to the present appellants....

Blenkarn was acting here just in the same way as if he had forged the signature of Blenkiron & Co., to the applications for goods; and as if, when, in return, the goods were forwarded and letters were sent accompanying them, he had intercepted them, and had taken possession of the goods and letters which were addressed to, and intended for (not himself but) the firm of Blenkiron & Co. How is it possible that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. Their minds never even for an instant of time rested upon him. As between him and them there was no consensus of mind which could lead to any agreement whatever. As between him and them there was merely the one side to a contract; where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown....The contract never came into existence. That being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

LORD HATHERLEY....If there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons of Wood Street, if they had chosen to adopt it; and to no other person whatever—not to this Alfred Blenkarn, with whom the respondents had not, and did not wish to have, any dealings whatever.

In *Higsons v. Burton* (26 L.J.R. Ex. 342), one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in

the action, was dismissed by his employers; he concealed that dismissal from a customer of the firm, the plaintiff in the action; and, having concealed that dismissal, continued to obtain goods from him still, as acting for the firm. The goods were delivered to him. But it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent; but he had been dismissed from the agency—there was no contract, therefore, with the firm. There was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm. The consequence was that there was no contract at all. There, as here, an innocent person, purchasing the goods from the person with whom there was no contract, was obliged to submit to his loss....

From beginning to end the respondents believed they were dealing with Blenkiron & Co., they made out their invoices to them, they supposed they sold to them, they never sold in any way to Alfred Blenkarn. Therefore Alfred Blenkarn cannot, by so obtaining the goods, have by possibility made a good title to a purchaser, as against the owners of the goods, who had never parted with the property nor with anything more than the possession of it.

* * * * *

LORD PENZANCE....I am not aware that there is any decided case in which a sale and delivery, intended to be made to one man, has been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. It was argued that as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought to be shewn that the respondents knew that there was such a person, and that he had offices there—whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in letters purporting to be signed "Blenkiron & Co."

I am unable to distinguish this case in principle from that of *Hardman v. Booth* (1 H. & C. 803). In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell & Co (which he had not); and then intercepted the goods and made away with them. The Court held that there was no contract with Thomas Gandell & Co., as they had given no authority; and none with Edward Gandell who had ordered the goods, as the plaintiffs never intended to deal with him. In the present case Alfred Blenkarn pretended that he was, and acted as if he was, Blenkiron & Co., with whom alone the vendors meant to deal. No contract was ever intended with him; and the contract which was intended failed for want of another party to it. In principle the two cases seem to me to be quite alike....

Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him

to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands. I do not think it necessary to express an opinion upon the possible effect of this character, because... in the present case the respondents were never brought personally into contact with Alfred Blenkarn....

Appeal dismissed.

[EDITOR'S NOTE. *Cundy v. Lindsay* was followed in *Baillie's Case* (L.R. [1898] 1 Ch. 110); where the plaintiff had joined the "Institute of Auctioneers and Valuers" through the fraud of its officers in leading him to believe it identical with the much more important "Auctioneers' Institute of the United Kingdom." It was held that the contract of membership was not a voidable one but actually void. "There never was any contract at all."

Contrast the state of things suggested by Lord Penzance and occurring in *Phillips v. Brooks, Ltd.* (L.R. [1919] 2 K.B. 243). *A*, falsely representing himself to be a certain rich Sir G. B., bought *in person* a ring. It was held that there the property did pass to *A*; as the shopkeeper meant to sell to the actual person whom he saw and listened to; although it is true that he would not have sold to him had he not been fraudulently misled.]

BOULTON v. JONES AND ANOTHER.

EXCHEQUER. 1857.

2 H. & N.

[*Order for goods—Acceptance by transferee of business.*]

THE plaintiff had been manager to one Brocklehurst, a pipe-hose manufacturer, with whom the defendants had been in the habit of dealing, and with whom they had a running account. On the morning of January 13th, 1857, the plaintiff bought Brocklehurst's stock and business, and paid for them. In the afternoon of the same day, the defendant's servant brought a written order, addressed to Brocklehurst, for three 50-feet leather hose. The goods were supplied by the plaintiff. The plaintiff's book-keeper struck out the name of Brocklehurst and inserted the name of the plaintiff in the order. An invoice was afterwards sent in by the plaintiff to the defendants, who said they knew nothing of him. The jury found a verdict for the plaintiff; leave was reserved to the defendants to move to enter a verdict for them.

M'Oubrey, for plaintiff. It is not denied by the defendants that the goods were the goods of the plaintiff. No one but the plaintiff could have sued for the price of them. By keeping the goods after notice that the plaintiff was the owner, the defendants must be taken to have adopted the contract with him. The defendants may have known of the change of name in the orders. In *Rayner v. Grote* (15 M. & W. 359), the plaintiff had represented himself to be merely the agent, but, being really the principal, he was held entitled to maintain the action.

POLLOCK, C.B....It is a rule of law, that if a person intends to contract with *A*, *B* cannot give himself any right under it. Here the order in writing was given to Brocklehurst. Possibly Brocklehurst might have adopted the act of the plaintiff in supplying the goods, and maintained an action for their price.

BRAMWELL, B....If the plaintiff were now at liberty to sue the defendants, they would be deprived of their right of set-off as against Brocklehurst. When a contract is made, in which the personality of the contracting party is or may be of importance (as a contract with a man to write a book, or the like, or where there might be a set-off), no other person can interpose and adopt the contract. As to the difficulty that the defendants need not pay anybody, I do not see why they should, unless they have made a contract either express or implied. The defendants did not know that the plaintiff was the person who supplied the goods; and allowing the plaintiff to treat the contract as made with him would be a prejudice to the defendants.

CHANNELL, B....When the invoice was delivered in the name of the plaintiff, it may be that the defendants were not in a situation to return the goods.

Rule absolute.

COUTURIER AND OTHERS v. HASTIE AND ANOTHER.

HOUSE OF LORDS. 1856.

5 H.L. 673.

[*Contract of Sale—Existence of article sold.*]

THE Couturier firm were merchants at Smyrna; Hastie & Hutchinson were corn-factors in London. This action was brought to recover from the latter the price of a cargo of corn, shipped at Salonica by the plaintiffs, and sold in London by the defendants upon a *del credere*¹ commission. The purchaser had repudiated the contract.

In January, 1848, the plaintiffs chartered a vessel at Salonica, to bring a cargo of 1,180 quarters of corn to England. On February 8th, a policy of insurance was effected on "corn; warranted free from average, unless general, or the ship be stranded." On the 22nd, the master signed a bill of lading, making the corn deliverable to the plaintiffs, or their assigns, "he or they paying freight, as per charterparty, with *primage* and average accustomed." On the 23rd the ship sailed on the homeward voyage. On May 1st, 1848, Messrs Bernouilli, the London agents of the plaintiffs, and the persons to whom the bill of lading had been indorsed, employed the defendants to sell the cargo; and sent them the bill of lading, the charterparty, and the policy of insurance; asking and receiving thereon an advance of 600*l*.

On May 15th, the defendants sold the cargo to A. B. Callander, who signed a bought note, in the following terms: "Bought of Hastie & Hutchinson, a cargo of about 1,180 quarters of Indian corn, of fair average quality when shipped per the *Kezia Page* from Salonica; at 27*s*. per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom,...payment at two months from this date, or in cash, less discount upon handing shipping documents."

¹ [EDITOR'S NOTE. An arrangement by which a vendor's agent, in consideration of receiving an increased (often doubled) remuneration, undertakes to be liable for the price if the purchaser fails to pay it. Such undertakings are held—somewhat singularly—not to fall within s. 4 of the Statute of Frauds, and therefore need not be in writing. See L.R. [1894] 1 Q.B. 285.]

In the voyage the cargo became so heated that the vessel was obliged to put into Tunis, where, after proceedings, regularly and *bonâ fide* taken, the cargo was, on April 22nd unloaded and sold. It did not appear that either party knew of these circumstances at the time of the sale. Callander, on May 23rd, wrote to Hastie & Hutchinson: "I repudiate the contract of the cargo of Indian corn on the ground that the cargo did not exist at the date of the contract; it appearing that the news of the condemnation and sale of this cargo at Tunis was published at Lloyd's on the 12th instant, three days prior to its being offered for sale to me."

The plaintiffs brought this action. At the trial, Martin, B., ruled that the contract imported that at the time of the sale the corn was in existence as such, and capable of delivery; and that as it had been sold and delivered by the captain before this contract was made, the plaintiffs could not recover in the action. He therefore directed a verdict for the defendants. The case was afterwards argued in the Court of Exchequer (8 Exch. 40); where judgment was entered for the plaintiffs. But, on appeal, the Exchequer Chamber (9 Exch. 102) were unanimously of opinion that the judgment of the Court of Exchequer ought to be reversed. The present writ of error was then brought in the House of Lords.

The Judges were summoned; and nine of them attended.

Sir F. Thesiger, for the plaintiffs. The purchase here was not of the cargo absolutely, as a thing assumed to be in existence, but merely of the benefit of the expectation of its arrival, and of the securities against the contingency of its loss. The purchaser bought in fact the shipping documents, the rights and interests of the vendor. The language of the contract implies all this. The representation that the corn was shipped free on board at Salonica, means that the cargo was the property of, and at the risk of the shipper. The Court of Exchequer proceeded on the words of this contract, and gave the correct meaning to them. Parke, B., said, "There is an express engagement that the cargo was of average quality when shipped, so that it is clear that the purchaser was to run the risk of all subsequent deterioration; for which he was to be indemnified by having the cargo fully insured; for the 27s. per quarter were to cover not merely the price, but all expenses of shipment, freight, and insurance." In a contract for the sale of goods afloat, there are two periods which are important to be regarded, the time of sale and the time of arrival. If at the time of the sale there is anything on which the contract can attach it is valid, and the vendee bound. The goods are either shipped, as here, "free on board," when it is clear that they are thenceforward at the risk of the vendee; or they are shipped "to arrive," which saves the vendee from all risk till they are brought to port, *Johnson v. Macdonald* (9 M. & W. 600). The intention of the parties is understood to be declared by different terms of expression, and the judgment of the Exchequer Chamber here really violates that intention....The parties were only dealing with an expectation (namely, the expectation of the arrival of the cargo). If a man will make a purchase of a chance, he must abide by the consequences. Here the chance was covered by the policy; for the cargo itself, as stated in the contract, had been actually

shipped. Had the cargo been damaged at the time of this contract, the loss, thereby arising must have been borne by the purchaser. Suppose the corn had been landed at Tunis, and had remained in the warehouse there, it would have ceased to be a "cargo" in the strict meaning of the word¹, but the purchaser would still have been bound.

The Court of Exchequer Chamber, admitting that the vendee might have recovered an average loss under the policy on this cargo, said that he could not have recovered if a total loss had occurred. *Roux v. Salvador* (3 Bing. N.C. 266), where there was a total loss, and the plaintiff recovered on the policy, it is difficult to understand how such an opinion could be entertained. The purchaser's right on this policy would have been complete; *March v. Pigott* (5 Burr. 2802).

By what has happened here, the purchaser has been saved the payment of freight; and *Owens v. Dunbar* (12 Ir. L.R. 304) shews that he would have been bound to accept the cargo. The contract here was, that the cargo was shipped "free on board." To that extent the vendor was bound; but he was not bound by any further and implied warranty, *Dickson v. Zizinia* (10 C.B. 602).

ALDERSON, B. The judges are unanimously of opinion that the judgment of the Exchequer Chamber was right.

LORD CRANWORTH, L.C....The whole question turns upon the construction of the contract which was entered into between the parties. Many ingenious arguments have been pressed, shewing that there might have been a meaning attached to that contract different from that which the words themselves import....A long-continued mercantile usage interpreting such contracts might have been sufficient to warrant a different construction. But in the absence of any such evidence, looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold, was—that there was an existing something to be sold and bought, and if sold and bought, then the benefit of insurance should go with it. I think the full benefit of the insurance was meant to go as well to losses and damage that occurred previously to the 15th of May, as to losses and damage that occurred subsequently (always assuming that something passed by the contract of the 15th of May). If the contract of the 15th of May had been an operating contract, and there had been a valid sale of a cargo at that time existing, I think the purchaser would have had the benefit of insurance in respect of all damage previously occurring. The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased². No such thing existing, I think the Court of Exchequer Chamber has come to the only - no
conclu-
reasonable conclusion.

Judgment for defendants in error.

¹ [EDITOR'S NOTE. For "cargo" (Spanish for "burden") means properly the goods loaded on a ship.]

² [EDITOR'S NOTE. Cf. the sale of a policy of insurance on the life of a man whom both parties mistakenly supposed to be still living; *Scott v. Coulson* (L.R. [1903] 1 Ch. 453), affirmed on appeal.]

RAFFLES v. WICHELHAUS AND ANOTHER.

EXCHEQUER. 1864.

2 H. & C. 906.

[Named Ship—Different ships meant.]

DECLARATION. For that it was agreed between the plaintiff and the defendants, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive ex "Peerless" from Bombay; and that the defendants would pay the plaintiff for the same at the rate of 17½d. per pound, within a certain time then agreed upon after the arrival of the said goods in England.—Averments: that the said goods did arrive by the said ship from Bombay in England, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea: that the said ship mentioned in the said agreement was meant by the defendants to be the ship called the "Peerless," which sailed from Bombay in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay in December.

Demurred.

Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the "Peerless." The words "to arrive ex 'Peerless,'" only mean that if the vessel is lost on the voyage, the contract is to be at an end.

[POLLOCK, C.B. It would be a question for the jury whether both parties meant the same ship called the "Peerless."]

That would be so if the contract was for the sale of a ship called the "Peerless"; but it is for the sale of cotton on board a ship of that name.

[POLLOCK, C.B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in Warehouse A, that is satisfied by the delivery of goods of the same description in Warehouse B.]

In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other "Peerless."

[POLLOCK, C.B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.]

The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract.

[POLLOCK, C.B. One vessel sailed in October and the other in December.]

The time of sailing is no part of the contract.

Mellish....There is a latent ambiguity, and parol evidence may be given for the purpose shewing that the defendant meant one "Peerless" and the plaintiff another. That being so, there was no consensus ad idem; and therefore no binding contract.

PER CURIAM. There must be judgment for the defendants.

Judgment for defendants.

BINGHAM v. BINGHAM.

CHANCERY. 1748.

1 VESEY SEN. 126.

[Purchase of land belonging to Purchaser.]

AN agreement was made for the sale of an estate to the plaintiff by defendant, who had brought an ejectment in support of a title thereto under a will. The bill was, to have the purchase money refunded as it appeared to have been the plaintiff's estate. It was insisted that it was the plaintiff's own fault, to whom the title was produced and who had had time to consider it.

Decreed [by FORTESCUE, M.R.] for the plaintiff; with costs, and interest for the money from the time of bringing the bill. For though no fraud had appeared, and the defendant apprehended he had a right, yet there was a plain mistake (1 Ves. Sen. 106), such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate, to which he had no right¹.

¹ ["In *Cooper v. Phibbs* (L.R., 2 H.L. 149), Lord Cranworth says: "The present Appellant, when, after the death of his uncle, he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was, in truth, his own property. Therefore he says: 'I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it.' In support of that proposition he relied upon *Bingham v. Bingham*, where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine." Nothing can be clearer than that Lord Cranworth recognised the principle that the Court would, even in the case of a completed contract, give relief against a common Mistake in the same way as it would against Fraud. And Lord Westbury says: "It is said, *Ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact. If parties contract under a mutual misapprehension as to their respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the Respondents believed themselves to be entitled to the property, the Petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand." It appears that the principle is thus rightly laid down by Lord Westbury, and that it applies to the case of an existing contract in a case where the Court is asked to make a decree for specific performance." *Per* Hall, V.C., in *Jones v. Clifford*, 3 Ch. D. 790. Note by Mr Finch.]

SCOTT v. LITLEDAL.

QUEEN'S BENCH. 1858.

27 L.J.R. Q.B. 201.

[Promisor's Error, as to Promise, not known to Promisee.]

[THE defendants possessed a sample of tea which they mistakenly believed to be a sample of 100 chests of tea then lying in bond¹ "ex the ship *Star of the East*." They handed this sample to a broker who was buying tea for the plaintiff. Through him a contract was accordingly made by which the plaintiff bought from the defendants the 100 chests; the defendants agreeing that the tea in those chests should be equal to the said sample. Before the end of the day on which this contract was made, the defendants found out their mistake about the sample. They gave immediate notice to the plaintiff that they repudiated the contract, on the ground of mistake. Before receiving this notice, the plaintiff had offered the tea for sale, and had agreed to "leave it on offer" for a day. This, by the usage of the tea trade bound him to sell it if the offeree determined within that time (as he actually did) to purchase it.

The plaintiff brought an action for non-delivery; and to the defendant's equitable plea of mistake, he demurred.]

Manisty, for defendants. The ground of defence is, that the contract was founded on a mistake in a material point. The sale was of specific tea.

[CROMPTON, J. It does not appear that this sample was better than the actual tea. The latter might have been the better. *Non constat* that the plaintiff might not have been willing to accept the tea, and waive the objection, if any. Why did you not deliver 100 chests? You must make out that you have a right to put an end to the contract even against the purchaser's wish.]

Yes. Suppose the tea in the ship better than the sample. The defendants contend that they had an equitable right to put an end to the contract; founded as it was on mistake, and the plaintiff having notice of the mistake before he had entered into any fresh contract; *M'Alpine v. Swift* (1 B. & B. 285)....

[LORD CAMPBELL, C.J. You say the contract is void?]

Yes; being founded on a mutual mistake. The sample only was seen.

[CROMPTON, J. The sample was shewn for the purchaser's advantage: surely he may waive the objection of the bulk not being the same.]

The defendants contend that the equity is against the whole contract. In Story's *Equity Jurisprudence*, sect. 134, it is said, "Contracts made in mutual error, under circumstances material to their character and consequences, seem, upon general principles, invalid. 'Non videntur qui errant, consentire,' is a rule of the civil law; it is founded on common sense and common justice." Where one party to a supposed contract knows of a fact and the other not, the contract is not voidable, unless there is a duty incumbent on the one who knows, of making known that fact to the other. But if neither of the contracting parties know of the fact, the contract is voidable.

¹ [EDITOR'S NOTE. *I.e.* placed in a warehouse (under the supervision of Revenue officers) after importation, under a bond that either customs-duty shall be paid on them or they shall be exported abroad.]

[WIGHTMAN, J. You do not give the vendee any option.]

[CROMPTON, J. And yet you say that *you* have the election. You may be entitled to some relief; but the question is, whether this Court can give the relief you are entitled to.]

LORD CAMPBELL, C.J. The defence is based on the assumption that the contract, under the circumstances, was necessarily void in equity at the option of the vendor. I think he had no such option. The contract is still existing. Possibly, a Court of equity might have given the defendants some relief, but it certainly would not have set aside the contract. The plaintiff might have been willing to complete the contract and take the 100 chests, notwithstanding the bulk was not equal to the sample. The defendants do not give him the option of waiving the objection, but insist that the contract is altogether void. A Court of equity would certainly not have treated the whole contract as simply void; and this Court has no means of settling the equities which may arise.

Judgment for plaintiff.

[EDITOR'S NOTE. But if Scott in the course of the negotiations preliminary to the contract, had discovered that the vendors were under a misapprehension as to the sample, the vendors would have been entitled to shew that they had not intended to enter into the contract by which the purchaser sought to bind them; see L.R. 6 Q.B. 597.]

The discussion of the true interpretation of *Scott v. Littledale* in Benjamin on Sale (6th ed., pp. 132-4) deserves study. The case should be compared with *Megaw v. Molloy* (2 L.R., Ir. 530), where an auctioneer, in selling maize out of the ship *Emma*, shewed by mistake a sample of (a better) maize out of the *Jessie*. In an action by the vendor, for non-acceptance, it was held that there was no contract, for the parties were not agreed as to the subject-matter. But in *Scott v. Littledale* the action was *against* the vendor who had caused the error, and who was thereby estopped at law from availing himself of his own blunder as a defence.]

SMITH v. HUGHES.

QUEEN'S BENCH. 1871.

L.R. 6 Q.B. 597.

[*Sale of goods—Promisee's Error, as to Promise, not known to Promisor.*]

[THE plaintiff was a farmer, the defendant a trainer of racehorses. The plaintiff, having some good winter oats to sell, had applied to the defendant's manager to know if he wanted to buy oats, and exhibited to him a sample; saying at the same time that he had forty or fifty quarters of the same oats for sale at the price of 35s. per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34s. a quarter. The plaintiff, having sent in a portion of the oats, the defendant, on meeting him afterwards, said, "Why, those were new oats you sent me"; to which the plaintiff having answered, "I knew they were; I had none other," the defendant replied, "I thought I was buying old oats: new oats are useless to me; you must take them back." This the plaintiff refused to do, and brought this action. At the trial, there was a conflict of evidence as to whether anything passed at the interview between the plaintiff and defendant's manager on the subject of the oats being *old* oats, the

defendant asserting that he had expressly said that he was ready to buy old oats, and that the plaintiff had replied that the oats were old oats, while the plaintiff denied that any reference had been made to the oats being old or new. It was stated by the defendant's manager that trainers as a rule always use old oats, and that his own practice was never to buy new oats if he could get old. But the plaintiff denied having known that the defendant never bought new oats, or that trainers did not use them; and, on the contrary, asserted that a trainer had recently offered him a price for new oats. Evidence was given for the defendant that 34s. a quarter was a very high price for new oats, and such as a prudent man of business would not have given. On the other hand, it appeared that oats were at the time very scarce and dear.

The judge of the county court left two questions to the jury: first, whether the word "old" had been used with reference to the oats in the conversation between the plaintiff and the defendant's manager; secondly, whether the plaintiff had believed that the defendant was under the impression that he was contracting for old oats; in either of which cases he directed the jury to find for the defendant. They found for defendant.]

* * * * *

Wilson, for the defendant. The judge's direction, in substance, amounts to this: If the defendant contracted to buy old oats, he is not bound to accept new oats. And in that sense the direction is correct. If the plaintiff was selling new oats, and the defendant was buying old oats, the parties were not *ad idem*, and there was no contract; and that is what the jury have found. That the sale was by sample is immaterial; the sample only affects the quality, provided the subject-matter is the thing contracted for: *Azemar v. Casella* (L.R. 2 C.P. 431); *Mody v. Gregson* (L.R. 4 Ex. 49). It has been held that where one party to a contract stands by and allows the other to enter into the contract under a delusion of which he was aware, and which he might have removed, the contract is void: *Hill v. Gray* (1 Stark. 434).

Pollock, Q.C., in reply. In *Hill v. Gray* there appears to have been a positive aggressive deceit.

COCKBURN, C.J. It is to be regretted that the jury were not required to give specific answers to the questions. For it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the judge's direction. Whereas now, as it is possible that the verdict may have proceeded on the second ground, we are called upon to consider whether the ruling of the learned judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy *old* oats, nor of the oats having been said to be old. On the other hand, we must assume that the defendant's manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting

his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not.

The defendant's manager having full opportunity of inspecting and judging of the sample, is practically in the same position as if he had inspected the oats in bulk. It cannot be said that, if he had personally inspected the oats in bulk, and then, believing—but without anything being said or done by the seller to bring about such a belief—that the oats were old, had offered a price for them, he would have been justified in repudiating the contract, because the seller (from the known habits of the buyer, or other circumstances) had reason to infer that the buyer was ascribing to the oats a quality they did not possess, and did not undeceive him.

Where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty (as where, for instance, an article is ordered for a specific purpose), and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to; and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding.

Mr Justice Story, in his work on Contracts (vol. i, s. 516), states the law as follows: "The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact which there is no legal obligation to divulge, will not avoid a contract; although it operate as an injury to the party from whom it is concealed. Thus, although a vendor is bound to employ no artifice for the purpose of concealing defects in the article sold (since that would amount to a positive fraud on the vendee), yet under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognizant; although his silence may operate virtually to deceive the vendee. But an improper concealment or suppression of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract." Further, distinguishing between extrinsic circumstances affecting the value of the subject-matter of a sale, and the concealment of intrinsic circumstances

appertaining to its nature, character, and condition, he points out (s. 519) that with reference to the latter, the rule is "that mere silence as to anything which the other party might by proper diligence have discovered, and which is open to his examination, is not fraudulent, unless a special trust or confidence exist between the parties, or be implied from the circumstances of the case." In the doctrine thus laid down I entirely agree.

Now, in this case, there was plainly no legal obligation in the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample; and gave the buyer the fullest opportunity of inspecting the sample, which, practically, was equivalent to an inspection of the oats themselves. What, then, was there to create any trust or confidence between the parties, so as to make it incumbent on the plaintiff to communicate the fact that the oats were not, as the defendant assumed them to be, old oats? If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different. Or even if he had said anything which shewed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller, as a means of misleading him, might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract. Here, however, nothing of the sort occurs. The buyer in no way refers to the seller, but acts entirely on his own judgment.

As the defendant, on a portion of the oats being delivered, was able by inspection to ascertain that they were new oats, his manager might, by due inspection of the sample, have arrived at the same result. The case is, therefore, one of the sale and purchase of a specific article after inspection by the buyer. Under these circumstances the rule *Caveat Emptor* clearly applies; more especially as this cannot be put as a case of latent defect, but simply as one in which the seller did not make known to the buyer a circumstance affecting the quality of the thing sold. The oats in question were in no sense defective; they were good oats, and all that can be said is that they had not acquired the quality which greater age would have given them. There is not any authority for the position that a vendor who submits the subject-matter of sale to the inspection of the vendee, is bound to state circumstances which may tend to detract from the estimate which the buyer may injudiciously have formed of his value. Even the civil law, and the foreign law founded upon it, which require that the seller shall answer for latent defects, have never gone the length of saying that, so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of its value.

An argument was pressed upon us, that the defendant intended to buy old oats, and the plaintiff to sell new; so the two minds were not *ad idem*; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive, operating on the buyer to induce him to buy, with one of the essential

conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel.

The result is that the learned judge was wrong in leaving the second question to the jury; and that, consequently, the case must go down to a new trial.

* * * * *

HANNEN, J....The rule of law is a corollary from the rule of morality which Mr Pollock cited from Paley¹, that a promise is to be performed "in that sense in which the promiser apprehended, at the time, that the promisee received it," and may be thus expressed: "The promiser is not bound to fulfil a promise in a sense in which the promisee knew at the time the promiser did not intend it." And in considering the question, in what sense a promisee is entitled to enforce a promise², it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent.

If, therefore, in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was only the apparent, and not the real bargain. But...in order to relieve the defendant it was necessary

¹ *Moral and Political Philosophy*, Book III, Ch. 5.

² [EDITOR'S NOTE. Paley points out that the proper sense for fulfilment is not (1) that in which promiser, in his own mind, meant to fulfil it, nor (2) that in which the promisee meant to accept it, but (3) the sense above quoted. Austin, however, (Lecture XXI) rejects (3); on the ground that it would be unfair to the promisee that a promiser should gain any exoneration by his own mistaken apprehension of the sense in which the promisee was receiving it. Hence Austin goes on to say, "The true rule is,—the understanding of both parties." But this does not help us, for the difficulty arises only when there is *not* any mutual understanding. Hence Whately—approved by Lord Blackburn (3 B. & S. 929) gives the better rule—"The sense in which the promisee *would reasonably* understand it." In other words, the sense which promiser gave promisee reasonable cause to put upon his words.]

that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats....

New trial ordered.

[EDITOR'S NOTE. In *Patterson v. Landsberg* (Session Cases, 1904-5, p. 675), a curious Scotch suit for repayment of the money paid for pretended historical jewels, Lord Kincairney said: "The case cannot be decided against the sellers on the ground of their silence...and non-disclosure only; nor on the ground of the *apparent* antiquity of the articles; nor because the purchaser believed them old; nor even because the vendors were aware that she was under that belief and did not undeceive her. For the contention that, when a seller gives no warranty, the buyer must protect himself, must be conceded." But judgment was given against the sellers, because they were proved to have been guilty of "active, direct, aggressive Falsehood."]

SECTION II

MISREPRESENTATION

BANNERMAN v. WHITE AND OTHERS.

COMMON PLEAS. 1861.

10 C.B., N.S. 844.

[Preliminary affirmation—Representation or Warranty?]

THIS was an action brought to recover the sum of 8350*l.* 16*s.*; being a moiety of the price of certain hops sold and delivered by the plaintiff to the defendants. The defendants pleaded,—first, that the defendants were induced to buy by the false and fraudulent representation of the plaintiff at the time of the sale that no sulphur had been used in the growth of the hops: secondly, that they did not promise as alleged.

The plaintiff is a hop-grower in Kent; the defendants are hop-merchants in London. Sulphur had been used to a great extent in the cultivation of hops; and in 1854 the Burton brewers, impressed with a notion that the quality of their beer had become thereby deteriorated; refused to buy any more hops which had been so treated. The hop-merchants thereupon sent a circular to the growers, stating that they would not in future purchase any hops without a guarantee that no sulphur had been applied to them. With a knowledge of this fact, the plaintiff, in October, 1860, offered the defendants his growth of that year. Samples were produced at the factor's in London; and, before the price was mentioned, the defendants inquired of the plaintiff if any sulphur had been used in the treatment of the hops that year. To this the plaintiff, according to the evidence of the defendants' witnesses, answered "No"; and the defendant White added that he would not even ask the price if any sulphur had been used. The evidence of the plaintiff's witnesses upon this point was, that the plaintiff, when asked if any sulphur had been used, said "There was no mould this year, and therefore no occasion to use any sulphur": but they did not recollect hearing the

defendant White say that he would not even ask the price if any sulphur had been used. The parties then proceeded to discuss the price; and ultimately the defendants agreed to buy the hops, the price to be paid, one half on the first of February, the other on the 1st of March following. At the time of the purchase, the plaintiff gave the defendants the following guarantee: "I hereby guarantee Messrs Wigan, White, and Wigans against any loss by my 1860 hops through the mode of treatment on the poles or curing, and hold myself liable to pay them any damage caused them thereby." The hops (which corresponded with the samples) were sent to the defendants' warehouse on the 24th of October, and were weighed on the 26th in the presence of the seller and of the buyers, the amount agreed to being 16,701*l.* 12*s.*

The defendants, having subsequently discovered that sulphur had been applied to a portion of the hops, wrote to the plaintiff on the 4th of December, repudiating the contract. It was proved that sulphur had been used to about five acres of the hops, the whole growth being three hundred acres; and that the whole of the hops, both sulphured and unsulphured, had been mixed together. It appeared that the plaintiff, having purchased a new machine, had been desirous of trying it, and so had used a small portion of sulphur to the five acres. This circumstance he had forgotten or had thought unimportant when discussing the terms of the contract with the defendants.

On the part of the defendants, it was submitted that the absence of the use of sulphur was expressly made by them a condition of their entering into the contract. For the plaintiff, it was insisted that the affirmation that no sulphur had been used was no part of the contract, but a mere representation, not wilfully false, and not amounting to a warranty; and that, the contract being for the purchase of a specific article, in the absence of a warranty or fraud, the buyers were bound. Two questions were left to the jury,—first, whether the plaintiff had wilfully made a false representation at the time of the contract, that no sulphur had been used,—secondly, whether the affirmation that no sulphur had been used in the growth of the hops was understood and intended by the parties to be a part of the contract, and a warranty to that effect.

The jury answered the first question in the negative, and the second in the affirmative: and they assessed the deterioration in market value of the hops by reason of the use of the sulphur at 4000*l.* Erle, C.J., thereupon directed a verdict for the defendants, reserving leave to the plaintiff to move to enter it for him for 6350*l.* 16*s.*...

Lush, Q.C., for plaintiff. In the case of a sale of a specific chattel, where the property has passed, the buyer cannot afterwards repudiate the contract on the ground that the article does not correspond with the representation or warranty. Here, the defendants bought all the plaintiff's hops of the growth of 1860, consisting of 449 pockets, by a sample drawn from each pocket. The seller could only perform that contract by delivering the very hops that were grown upon his land. And the moment they were inspected, weighed, and delivered, the property in them passed to the buyers. The rule upon this subject is clearly and accurately stated

in the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 4th ed. 22, 23: "It is settled by *Street v. Blay*, 2 B. & Ad. 456, and *Poulton v. Lattimore*, 9 B. & C. 249, 4 M. & R. 208, that, where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. (1) He may refuse to receive the article at all (the power to pursue this first course, however, not extending to cases where there has been a warranty upon the sale of a *specific chattel*, and where, the property passing by the contract, it is not competent to the vendee to rescind it without the consent of the vendor, or a stipulation to that effect). (2) He may receive it, and bring a cross action for the breach of the warranty. (3) Or he may, without bringing a cross action, use the breach of warranty in reduction of the damages in an action brought by the vendor for the price; i.e. to the extent of the difference between the agreed price and the real value (at the time of delivery) as reduced by the breach of contract....A warranty, properly so called, can only exist where the subject-matter of the sale is ascertained and existing so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities; but the property passing by the contract of sale, a breach of the warranty cannot entitle the vendee to rescind the contract, and revest the property in the vendor, without his consent; the vendee must therefore resort to an action for such breach, or give it in evidence in reduction of the price, or as an answer to the action if the breach renders the article wholly worthless." Here, everything is specific and defined. The seller delivered what he contracted to deliver, and the buyer received what he contracted to buy: the warranty as to sulphur was altogether collateral.

[WILLES, J. The property does not pass by the contract of sale; but only upon acceptance, after inspection and weighing. Our law is peculiar in that respect. Is there any case in which it has been held that the seller can put the property on the buyer against his will, if he repudiates the contract before the seller has done all that he has to do to the goods?]

The buyer is not bound to accept something only colourably answering the description of the thing sold. Here, the hops were in the defendants' own warehouse; and the moment they were examined and weighed, everything had been done on the seller's part to vest the property in them in the defendants.

* * * * *

ERLE, C.J....It was contended on one side that the conversation relating to the sulphur was preliminary to entering on the contract, and no part thereof; both from the form of expression and also from the written guarantee which was shewn to have been given. On the other side it was contended that the whole interview was one transaction, that the intention of the parties was alone to be regarded, that the defendants had declared the importance they attached to the inquiry, and that the plaintiff must have known it. And the jury answered this question in the affirmative.

The effect of this finding of the jury, taken with the evidence, is now to be considered. (We avoid the term "warranty," because it is used in two senses¹, and the term "condition," because the question is whether that term is applicable.) The effect is that the defendants required, and that the plaintiff gave his undertaking, that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used.

Rule discharged.

MONTEFIORI v. MONTEFIORI.

KING'S BENCH. 1762.

I SIR W. BLACKSTONE, 363.

[Representation by Third Person.]

JOSEPH MONTEFIORI, a Jew, being engaged in a marriage treaty, his brother Moses, to assist him in his designs and represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between him and his brother Joseph; which balance he (Moses) acknowledged to have in his hands; though, in truth, no such balance or any thing like it existed. After the marriage had, Moses reclaimed this note, as being given on no consideration; and the matter was referred to arbitration. The arbitrators awarded the note to be given up, which Joseph refused to do. Upon which the Court was moved for an attachment against him, for non-performance of this award; and on his part a cross motion was made, to set aside this award, on a suggestion that the arbitrators were mistaken in point of law.

LORD MANSFIELD, C.J. The law is, that where, upon proposals of marriage, third persons represent any thing material, in a light different

¹ [EDITOR'S NOTE. Lord Abinger, C.J., said in *Chanter v. Hopkins* (4 M. & W. 399): "Confusion has arisen from the use made of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and, though part of the contract, yet collateral to the express object of it. But, in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such contract a breach of warranty. It would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as, if a man offers to buy *peas* of another, and he sends him *beans*, he does not perform his contract; but that is not a warranty: there is no *warranty* that he should sell him *peas*; the contract is to sell *peas*, and, if he sends him anything else in their stead, it is a non-performance of it."]

from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It *shall* be as represented to be. And the husband alone is entitled to relief, as well as when the fortune, &c. so misrepresented has been specifically settled on the wife. For no man shall set up his own iniquity as a defence, any more than as a cause of action. The arbitrators therefore being clearly mistaken in point of law, the award must be set aside.

Award set aside.

FREEMAN AND ANOTHER v. COOKE.

EXCHEQUER. 1848.

2 EXCHEQUER REPORTS, 654.

[*Seizure by sheriff—Representation by Third Party.*]

TROVER by the plaintiffs, as assignees of William Broadbent, for the conversion of certain goods of the bankrupts before the bankruptcy. The defendant pleaded not guilty; not possessed; and leave and licence. The defendant was the sheriff of Yorkshire. His officers had seized the goods in question, under a writ of *fi. fa.*¹, against Joseph and Benjamin Broadbent. William Broadbent, in anticipation of a distress, had removed the goods (which were his) to the house of his father Joseph, and afterwards to the house of his brother Benjamin. When the officers entered Benjamin's house, the bankrupt told them they were the goods of his brother Benjamin (supposing, as it would seem, that the writ was against himself). The writ, being produced, was against Benjamin. William then told the officers that the goods belonged to another brother, Joseph; and, finally, that they were his own. The goods were then seized, and sold as those of Benjamin. It was contended, by the defendant's counsel, that the statements and conduct of the bankrupt operated as conclusive evidence, against him, that the property was not his at the time of the conversion, and that the assignees were also bound. The jury found, that the goods were, in fact, William's; and also, "that William represented the goods to the sheriff's officers as the goods of Benjamin, *so as* to induce them, by that false representation, to seize the goods." The plaintiff, under the direction of Alderson, B., obtained a verdict; leave being reserved to the defendant to move to enter a verdict in his favour....

PARKE, B.... Estoppels by record and by deed must, in order to make them binding, be pleaded, *if there be an opportunity*; otherwise the party omitting to plead it waives the estoppel, and leaves the cause at large. on which the jury may find according to the truth. But with respect to estoppels in pais, in certain cases there is no doubt they need not be pleaded in order to make them obligatory. For instance, where a man represents another as his agent, in order to procure a person to contract

¹ [EDITOR'S NOTE. *Fieri facias* is a writ ordering the sheriff to levy execution of a judgment by seizing and selling the goods and chattels of the judgment-debtor. "Cause [the needful sum] to be made" is the translation given in Pollock and Maitland's *History E. L.* II. 594.]

with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law. No form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. The same rule appears to apply to all similar estoppels in pais. The estoppel, therefore (if it be one), created by the conduct of the bankrupt in this case, is not opened by the omission to plead it. The only question is, whether it be an estoppel? It is contended that it was, upon the authority of the rule laid down in *Pickard v. Sears* (6 A. & E. 474). That rule is, "that, where one, by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The principle is stated more broadly in the case of *Gregg v. Wells* (10 A. & E. 97); where Lord Denman says, that a party who *negligently* or *culpably* stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. The rule itself, as above laid down in *Pickard v. Sears*, must be considered as established. By the term "*wilfully*," however, in that rule, we must understand (if not that the party represents that to be true which he knows to be untrue), at least, that he means his representation to be acted upon, and that it is acted upon accordingly. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth. And conduct, by negligence or omission, where there is a duty cast upon a person (by usage of trade or otherwise) to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorized.

But if we apply this rule, the finding of the jury is insufficient to entitle the defendant to have a verdict entered for him on the plea of Not Possessed. If it is not found that he *intended* to induce the officer to seize the goods as those of Benjamin; and, whatever intention he had on his first statement, was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation, taken altogether. In truth, in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or licence of the party making it. Here there is no pretence for saying it amounted to a licence; and a contract is out of the question.

Rule discharged.

LONDON ASSURANCE v. MANSEL.

CHANCERY DIVISION. 1879.

L.R. 11 Ch. D. 363.

[Proposal for Life Assurance—Concealment.]

ACTION to set aside an agreement to grant a policy of life assurance to the defendant.

On August 20th, 1878, the defendant left with the plaintiffs at their office a proposal for assurance on his life for £10,000 filled up on one of the plaintiffs' forms of proposal, and signed by the defendant. The questions and answers contained in this proposal, so far as material, were as follows:

Questions	Answers
Are you now and have you always been of temperate habits?	Yes.
State if there be any other material circumstances affecting your past or present state of health or habits of life to which the foregoing questions do not extend?	Not to my knowledge.
Has a proposal ever been made on your life at any other office or offices? If so, where?	Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.
Was it accepted at the ordinary premium, or at an increased premium, or declined?	

At the foot of the proposal the defendant signed the following declaration: "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the London Assurance."

The plaintiffs (being satisfied with the said proposal, and with the report of their medical officer, and with the answers they had received from two friends of the defendant to whom he had referred them) sent a written acceptance of the proposal for an assurance of £10,000 on the defendant's life, and received from him a cheque for the first year's premium. On the 24th of August the plaintiffs sent him the usual certificate as to the assurance being effected.

[Shortly afterwards, they discovered that the defendant had applied in 1877 and 1878 to several insurance companies to insure his life, and had had his proposals declined by them. They discovered that, though the defendant's life had been assured for £10,000 in the Rock Life Assurance Company, and also for £6000 in the Equity and Law Life Assurance Society, the last-named assurance society had in November, 1877, when the defendant applied for a further assurance of £3000, decided not to increase the amount at risk on his life; also that the defendant had shortly afterwards made proposals to the Scottish Equitable Society and to the Crown Insurance Society, who had respectively declined his proposals, to the North British and Mercantile Insurance Society, which

proposal was withdrawn, and to the Liverpool, London, and Globe Company; by whom the proposal was not accepted; that in June, 1878, the English and Scottish Law Life Assurance Association, after accepting a proposal for an assurance of £5000 on the life of the defendant, had refused to proceed with it on learning that the Equity and Law Life Society had declined the further assurance of the defendant's life; also, that in August, 1878, the defendant had applied for assurances on his life to the Clerical Medical and General Life Assurance Society, to the Scottish Amicable Assurance Society, and the Law Life Assurance Society, but that each of the said offices had declined his proposals.

They thereupon determined not to proceed with the assurance, and wrote to that effect, and sent a cheque for the amount of the premium, which was returned by the defendant.]

The plaintiffs then brought their action, alleging that it was the duty of the defendant to have informed them that his life had been refused by the said several offices, that such fact was a very material fact in a contract of life assurance, and that the plaintiffs would not have entertained the defendant's proposal for assurance had he informed them that his life had been refused by other offices. They claimed a declaration that the acceptance of the defendant's proposal for assurance on his life for £10,000, and the contract by the plaintiffs for the assurance on the life of the defendant, were void.

The defendant admitted that proposals were made to three Societies for an assurance on his life, and such proposals were declined, without any medical examination. He also stated that the English and Scottish L. L. Assurance Society passed his life as a first-class life; but (having learned that the Equity and Law L.A. Society had decided not to increase their risk on the defendant's life) exercised their right of declining to complete the transaction.

Chitty, Q.C., for defendant. The plaintiffs in this case have entered into a contract on the basis of negotiations which they admit are true; but which they allege are not sufficient, because they have since ascertained some other facts which they say are material. But this is not sufficient to invalidate a contract for life assurance. In *Lindenau v. Desborough* (8 B. & C. 586), though it was held that it was the duty of a party effecting an assurance on life or property to communicate to the underwriter all material facts within his knowledge touching the subject-matter of the insurance, yet it was laid down that it was a question for the jury whether any particular fact was or was not material. The same principle was recognised in *Morrison v. Muspratt* (4 Bing. 60). Here, everything that was material was disclosed. And though the question might have been more fully answered by the defendant, still the plaintiffs were satisfied with the answer, without inquiring further whether the defendant's life had been declined by any other office. They cannot now raise the question and come to the Court to set aside the contract.

JESSEL, M.R. The first question to be decided is, what is the principle on which the Court acts in setting aside contracts of assurance? As regards the general principle I am not prepared to lay down the law as making any difference in substance between one contract of assurance

and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases. And, though from the peculiar nature of marine insurance there may be certain circumstances which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.

But I think the law has been laid down very often.

In *Dalglish v. Jarvie* (2 Mac. & G. 231), Lord Cranworth says: "Insurances are said to require the utmost degree of good faith, '*uberrima fides*.' In cases of insurance a party is required not only to state all matters within his knowledge which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud: but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy."... In a case which was an action on a policy of insurance, *Lindenau v. Desborough* (8 B. & C. 591), Lord Tenterden says: "Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, still the general question, put by the office, requires information of every fact which any reasonable man would think material." That passage shews that the non-answering of a specific question in Lord Tenterden's opinion would amount to concealment, if the man knew the fact and was able to answer it¹. And Bayley, J., says: "I think that in all cases of insurance"—then he goes on to add what Lord Cranworth did not add, but which he meant—"whether on ships, houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach."

Now I come to the facts of the case. The office asks these questions: "Has a proposal ever been made on your life at any other office or offices; if so, where? Was it accepted at the ordinary premium, or declined?" And there is an agreement at the end, "That this proposal and declaration shall be the basis of the contract between the assured and the company." Here is the answer: "Insured now in two offices for £16,000

¹ [EDITOR'S NOTE. "If as much as an answer does state is not untrue, the answer may (in one sense) be said to be true. But it may nevertheless be substantially an untrue statement." (*Per* Pollock, C.B., in *Cazenove v. British Equitable Assurance Co.*; 6 Jurist, N.S. 826.) E.g. "Have you ever had a fire?" "Yes, in 1918" (suppressing others of 1919 and 1920). An answer in the nature of a trap. Cf. *Condogianis v. Guardian A. Co.* (L.R. [1921] A.C. 12).]

at ordinary rates. Policies effected last year." It is to be observed that the man proposing the assurance, who knows the facts, does not answer the question. He does not state, "I proposed to half a dozen offices," which was the truth; but simply says, "Insured now in two offices." This of course must have been intended to represent an answer; and therefore would mislead the persons receiving it, who did not look at it with the greatest attention, into the belief that he was insured in two offices, and that they were the only proposals that he had made. "Was it accepted at the ordinary premiums or an increased premium?" His answer is, "At ordinary rates." That is the answer to the second branch of the inquiry; but he has not answered the question, "or declined?" The inference, therefore, which must have been intended to be produced on the mind of the person reading the answer was that it had not been declined. And in my opinion that is the fair meaning of the answer; and the assured is not to be allowed to say, "I did not answer the question." But if it were so, it would make no difference, because if a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment, properly so called, means non-disclosure of a fact which it is a man's duty to disclose. And it was his duty to disclose the fact if it was a material fact.

The question is whether this is a material fact? I should say, no human being acquainted with the practice of insurance societies could doubt for a moment that it is a fact of great materiality, a fact upon which the offices place great reliance. They always want to know what other offices have done with respect to the lives....We have an admission by the defendant that no less than five insurance offices had declined to accept his life....When you go to the Insurance Office and ask for an insurance on your life, ought you to tell them that your proposals had been declined by five other assurance offices? There can be but one answer—a man is bound to say, "My proposals have been declined by five other offices." There can be no doubt, as a proposition to be decided by a jury, that such a circumstance is material. And here, the proposal which forms the basis of the contract asks a question—Has a proposal been declined? Now where it is to form the basis of the contract it is material; because, as was held in the House of Lords in *Henderson v. Fitzgerald* (4 H.L.C. 484), where it is part of the contract, the other side cannot say it is not material. So here we have the proposal as the basis of the contract. It is impossible for the assured to say that the question asked is not a material question to be answered; and that the fact which the answer would bring out is not a material fact.

Further, we have this, that within the defendant's own knowledge the English and Scottish L. L. Assurance Society (having accepted his life and merely reserving a right to decline) when they found that one other office (not five, but one) had declined the proposal, at once withdrew from their acceptance and declined his proposal. So the defendant had the strongest reasons for believing from actual knowledge that the fact of a proposal having been declined was a most material circumstance, and would have the greatest effect on the mind of the proposed assurers.

The order will be—The plaintiffs being willing to return the premium, declare that the acceptance by the plaintiffs of the defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled.

[EDITOR'S NOTE. The Marine Insurance Act, 1906 (6 Edw. 7, c. 41), provides expressly, by s. 18 (1), that in marine insurances, "Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured; and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract." See also s. 20, as to all representations made during the negotiations for the contract. Other forms of Insurance remain rendered *uberrimæ fidei* by judiciary law. As to fire insurance, see *Ionides v. Pender* (L.R. 9 Q.B. 538).]

FLIGHT v. BOOTH.

COMMON PLEAS. 1834.

1 BINGHAM, N.C. 370.

[*Sale of Land—Misleading Particulars.*]

THE action was brought to recover the sum of 100*l.* paid by the plaintiff as a deposit on the purchase by auction of certain premises in Covent Garden, held under a lease from the Duke of Bedford. The premises were described in the printed particulars of sale (on the back of which the plaintiff had signed the memorandum of the contract) as calculated for an extensive business in carpets, haberdashery, drapery, paper, floor-cloth, upholstery, grocery, tea trade, or coach-building. It was also stated in the same particulars, that, by a clause in the lease, "the lessee is to insure the premises for 3000*l.*, and no offensive trade is to be carried on; they cannot be let to a coffee-house keeper, or working hatter." Printed conditions of sale followed; and by the sixth it was provided, that if, through any mistake, the estate should be improperly described or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money, as a compensation either way. It was provided, that if the purchaser should neglect or fail to complete the purchase within a day, which had expired previously to the commencement of the action, the deposit money should become forfeited to the vendor. The sale took place, and the contract was signed, on the 16th of May, 1833. On June 10th an abstract of title was delivered which contained the following note of the proviso hereinafter set out—"proviso for re-entry in case of non-payment of rent, or non-performance of covenants, or carrying on any particular trade without a licence for that purpose first had and obtained." At the date of the sale and contract the lease was a valid and subsisting one. The plaintiff's solicitor never required to see the lease. And on the 15th of July the plaintiff, so far as in him lay, rescinded the contract; and having demanded back again the deposit, without success, brought

the action in question. [By consent of both parties it was referred to an arbitrator.]

At the trial the lease was produced, and appeared to contain the following proviso: "Provided always, that if at any time during the continuance of the said term, the trades of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-monger, fruiterer, herb-seller, coffee-house keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter, or any or either of them, shall be exercised upon the said demised premises, or any part thereof;...or the same be used as a shop or place for the sale of coals, potatoes, or any provisions whatsoever;...without a licence for that purpose under the hand of the said duke, his heirs or assigns;...then and thenceforth, and in either of such cases, it shall be lawful for the said duke, his heirs and assigns, to re-enter."

It was not proved before the arbitrator that the plaintiff, at the time of the sale, or of the signing the contract, had ever seen the lease or heard it read, or that he or his solicitor was aware of the terms of the proviso until the day of the trial. Evidence was offered, on the part of the defendant, to prove that the lease was produced at the sale, and that the proviso had been publicly read. That evidence was objected to on the part of the plaintiff's counsel; the arbitrator received it only to negative any wilful concealment or misrepresentation by the defendant of the terms of the lease; and found that none such was proved against him.

The arbitrator found that the plaintiff had good cause of action, and ordered that the verdict be the sum of 100*l*. And if the facts above set out did not authorize the plaintiff, in the opinion of the Court, to rescind the contract of sale, then the arbitrator directed the verdict to be entered for the defendant....

Taddy, Serjt., for the defendant. If there has been any misdescription of the premises at the auction, it was a misdescription originating from inadvertence, and not from fraud or any intention to mislead. Under such circumstances, though the plaintiff might require compensation for any difference in value between the representation and the reality, yet he could not rescind the contract....As to the possibility of the plaintiff's intending to deal in vegetables, the alleged misdescription could not have misled him, for the house is not described as situated in the market, but in the piazza; and the rule *Caveat emptor* applies. The lease was read by the auctioneer, and the plaintiff might have required to inspect it. Even where property is held under a lease containing covenants contrary to custom, a purchaser is not entitled to compensation if he knew of the existence of the lease; *Hall v. Smith* (14 Ves. 426). If there be any misdescription, the conditions of sale expressly entitle him to compensation, and *Drewe v. Hanson* (6 Ves. 675) shews the principle on which it may be estimated.

TINDAL, C.J....The arbitrator having expressly found that no wilful concealment or misrepresentation was proved against the defendant, we must consider the case as standing clear from any fraud; and take the misdescription of the premises to have originated either from ignor-

ance, inadvertence, or accident. The question, therefore, is narrowed to the single point, whether the misdescription in the printed Particulars of Sale of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether; or whether it was such as was contemplated by the sixth condition, that if through any mistake the estate should be improperly described, such error or misstatement should not vitiate the sale; but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money as a compensation.

All the cases concur in this, that where a misstatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. In this state of discrepancy it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether; and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney* (3 Camp. 284), where the subject-matter of the sale was described to be "a free public house," while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal.

In the case under discussion the particulars represent the house as calculated for an extensive business in various trades therein enumerated; to which it was added that "no offensive trades are to be carried on: the premises cannot be let to a coffee-house keeper or working hatter." Any person reading this particular, and having no information but what he derives from it, that is, perhaps, every person attending the sale, would conclude, that he was not prevented by the terms of the lease from carrying on any trade in it, except those which were of a class generally acknowledged to be offensive, and the two enumerated trades of coffee-house keeper and working hatter. He would never suppose, nor have any reason to suppose, that he was prevented from carrying on the trade of a baker, a fruiterer, or a herb-seller, in a house situated in the piazza of Covent Garden market; much less that the lease was to become void, if the house, so situated, was used as a place for "the sale of any provisions whatever." The latter restriction would extend to prevent trades of the most innocent and inoffensive kinds from being exercised on the premises; such as a flour factor, a biscuit seller, or the like. Under these circumstances, it appears to us that a lease

which is described as containing a restriction against offensive trades, and a lease containing restrictions not only against offensive trades but also against some trades that are inoffensive, are not one and the same thing, but a different subject-matter of contract. Where a man purchases by the former description, it may very well be supposed that he would not have become the purchaser (whether he bought for the purpose of carrying on trade upon the premises himself, or for a money investment) if he had known the lease had contained the larger and more extensive restrictions. Indeed, the very terms of the sixth condition of sale scarcely apply to a case where the difference of value is so uncertain and arbitrary as in the present case. The condition, that the parties are to pay or allow "a proportionate value according to the average," will comprehend a case where there is half an acre more or less than is described, or cases which resolve themselves into simple calculations of that nature. But how will it govern such a misstatement as the present? What action at law can be framed upon it? It would at least involve the purchasers in great difficulties. The least being in the hands of the vendor, he had peculiarly, and indeed exclusively, the means of knowledge of the exact restrictions contained in it; the purchaser at the auction had none. For the reading the lease at the auction by the auctioneer is decided to be no excuse for misdescription of the terms of the lease in the Particulars of Sale; *Jones v. Edney* (3 Camp. 285). As to laches on the part of the purchaser in not sooner demanding an inspection of the lease (which was urged as an argument on the part of the defendant), he had not the most distant reason to suspect any misdescription, until the abstract was delivered; and then the suspicion would come too late. For the question is, whether he was bound or not at the time the contract was made. If, indeed, there had been any waiver of the objection in this case, our decision would have been different; but, so far as can be inferred from the facts found upon the award, the lease was never seen by the purchaser, nor the objection ever taken, until the trial of the cause. He stood then, as he might do, upon his legal right to recover the deposit.

*Rule discharged*¹.

[EDITOR'S NOTE. *Flight v. Booth* was approved, and followed, in *Re Puckett and Smith* (L.R. [1902] 2 Ch. 258). There, land had been sold for £4000 for building purposes, but with a condition that errors were neither to annul the contract nor to cause compensation. Neither party was then aware, nor could have discovered by ordinary inspection, that the land was crossed by a subterranean culvert which impaired its fitness for building and would cost £500 to rectify. The condition was held not to cover this fundamental error which rendered the contract void.

Contrast *In re Brewer* (80 L.T. 127) where the land was *not* sold for building purposes.]

¹ ["It is the obvious duty of a vendor to make himself fully acquainted with all the peculiarities and incidents of the property which he is going to sell; and when he describes the property for the information of the purchaser, it is his duty to describe everything which it is material to know, in order to judge of the nature and value of the property. It is not for him just to tell what is not actually untrue, leaving out a great deal that is true; and leaving it to the purchaser to inquire whether there is any error or omission in the description or not."—*Per Kindersley, V.-C.*, in *Brading v. Plummer*, 2 Drewry 427, 429. Note by Mr Finch.]

EDWARDS v. WICKWAR.

CHANCERY. 1865.

L.R. 1 Eq. 68.

[Vendor and Purchaser—Conditions of Sale—General words—Concealment.]

THIS case came on upon summons adjourned from Chambers. A decree had been made for the sale of leasehold estate, and the property had been put up for sale under conditions, one of which was as follows: "It will appear from the abstract that an underlease of the property was, in 1852, granted to John Stone for twenty-one years from the 25th of December then last. The said John Stone is believed to have absconded, and not to have paid any rent for several years past; and inasmuch as a fresh underlease was on the 1st of October, 1864, purported to be granted by the trustees of the will of the testator in the present cause to the present tenant who is in possession under it, no objection or requisition shall be made in respect of the underlease of 1852, or of any derivative interest created thereout, or of any underlease or tenancy prior to the said underlease of 1864."

Another underlease had, within the knowledge of the vendors, been made prior to 1864, to a gentleman of the name of Palmer.

At the sale one Mr Brayne was declared purchaser, and an abstract was duly delivered to him. Notice of Palmer's underlease, and of the vendors' knowledge of it, appearing on the chief clerk's certificate in the cause, the purchaser returned the abstract with a requisition, among others, requiring an abstract to be furnished of Palmer's underlease, and that the underlease itself should be produced, and a surrender of it obtained at the vendors' expense. The vendors declined to comply with this requisition, contending that it was covered by the general words in the condition that no requisition should be made respecting any underlease prior to 1864. The purchaser being unwilling to proceed with the sale until the requisition was complied with, the vendors summoned him to shew cause why he should not proceed, and the summons was adjourned into Court.

Giffard, Q.C., for the vendors. The objection taken by the purchaser is one which by the condition he was precluded from raising; for the words excluding requisitions in respect of any other underlease were inserted for the purpose of meeting this very case. The purchaser would have been in no respect better off, had the underlease to Palmer been mentioned in express words in the condition, than he was under the general words contained in it; and could not have been induced to bid by the suppression of express mention of that underlease.

SIR W. PAGE WOOD, V.C. It was the clear duty of the vendor to give the fullest information which he himself possessed as to the title. The object of special conditions of sale is to protect the vendor from inquiries which he himself may be unable to satisfy, and objections which he cannot explain away. There may, indeed, be cases like *Freme v. Wright* (4 Madd. 364), where assignees of a bankrupt have stipulated that such title only as the bankrupt had should be required by the purchaser; but even in that case it has been thought a stretch of the jurisdiction of the Court to force the title on a purchaser. There is in this case nothing analo-

gous to such a state of things as occurred there. I do not wish to lay down any different rule regarding sales under the direction of this Court from that which prevails generally, but certainly the principles on which such sales are conducted ought not to be more lax as to the complete bona fides required than those which are held to govern in other cases. Here it was plainly the duty of the parties to disclose the underlease; and it would be most mischievous to allow a vendor to suppress facts known to him affecting the title, and yet compel a purchaser to accept it.

LEE AND ANOTHER v. JONES.

EXCHEQUER CHAMBER. 1864.

34 L.J.R. C.P. 131.

[*Guarantee—Concealment—Misrepresentation.*]

[JAMES PACKER acted as commission agent for the plaintiffs, selling coals which they supplied, and receiving payment for them; charging a commission upon each transaction. He gave bills to the plaintiffs which were to be paid at stipulated times. As this involved considerable responsibility on the part of Packer, he in 1856 gave security to the plaintiffs by a guarantee from his mother, Sarah Tinson, to the amount of 300*l*. The business went on, and his accounts became in 1861 in arrear by 1332*l*.; upon which the plaintiffs told him that they could not allow his employment to go on unless he found further security. Thereupon he undertook to procure the defendant and four others to sign a further security for 300*l*. more, of which the share of the defendant was to be 100*l*.

On this, the plaintiffs caused an agreement to be prepared, and sent it to the defendant by their collector, who had no authority to answer any statements respecting it. The defendant made no inquiry of the plaintiffs respecting the state of Packer's account, nor did the plaintiffs give the defendant any information respecting it. Nothing was stated in the agreement of guarantee executed by the defendant respecting the debt due from Packer to the plaintiffs, or respecting the state of the accounts or the course of business between them, except as is above set out. The case found that there was no evidence to shew that the plaintiffs were aware that Packer had actually received from the customers for the coals the monies making up the 1332*l*.; and it did not otherwise than inferentially from the above statement aver that Packer himself had received the money. The defendant, when he executed the agreement, was not aware of the debt due from Packer to the plaintiffs. The agreement was expressed to be "supplemental and in addition to" Sarah Tinson's guarantee; thus shewing that the new suretyship was to be retrospective.

The action was brought to recover Jones' guaranteed 100*l*. On the trial a verdict was found for the defendant; Erle, C.J., before whom the case was tried, holding that there was evidence of fraud for the jury. Leave was reserved to the plaintiffs to move to enter a verdict for 100*l*. The plaintiffs having moved accordingly, the Court of Common Pleas supported the ruling of the Chief Justice. An appeal was carried to the Exchequer Chamber.]

* * * * *

BLACKBURN, J....It was decided in *The North British Insurance Co. v. Lloyd* (10 Exch. 523) that the rule that all material circumstances known to the assured must be disclosed, is peculiar to contracts of insurance, and that it does not extend to contracts of guarantee. A surety is, in general, a friend of the principal debtor, acting at his request, and not at that of the creditor; and in ordinary cases it may be assumed that the surety obtains from the principal all the information which he requires; and great practical mischief would ensue, if the creditor were by law required to disclose everything material known to him, as in a case of insurance. If it were so, no creditor could rely upon a contract of guarantee unless he communicated to the proposed sureties everything relating to his dealings with the principal to an extent which would, in the ordinary course of things, be so vexatious and annoying to the principal that such a rule of law would practically prohibit the obtaining of contracts of suretyship.

But I think, both on authority and on principle, that when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation (or, at least, is evidence of a representation) that there is nothing in the transaction that might not naturally be expected to take place between the parties to a transaction such as that described. And if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that if it were known to him he would not enter into the contract of suretyship, I think it is evidence of a fraudulent representation on his part. In the present case the plaintiffs had no personal communication with the defendant, the surety; and when they sent the agreement to him for execution they sent it by an agent who had no authority from the plaintiffs to make any statement whatever, or to do anything more than obtain the defendant's signature to the agreement thus sent. The argument for the plaintiffs before us was that under such circumstances, though there might be a concealment or non-disclosure of material facts, there could not be any misrepresentation on the plaintiffs' part, and that without it there could be no fraud. During the argument I was inclined to be of that opinion; but on consideration I have come to the conclusion, that in this case there was evidence of intentional deceit by a false representation of the kind I have above referred to, amounting to actual fraud. The written agreement which, before it was executed, the plaintiffs sent to the defendant, recites, that Packer, the principal, had been for some time salesman to the plaintiffs on terms by which he was, in substance, to be a *del credere* agent¹, settling and paying for what he had sold monthly; and that they had required from him security to induce them to continue him in the employment; and stipulated that the defendant and others should give them a floating and continuing guarantee for the term of three years from the date thereof, to secure the amount of any balance which might, at any time, be due to them

¹ [EDITOR'S NOTE. See note to *Couturier v. Hastie*, *supra*, p. 231.]

on the coal account. I think this was evidence of (or rather, if not qualified by other matters, amounted to) a representation that there was nothing in the transaction between the plaintiffs and Packer which might not, in the ordinary course of affairs, be expected to have taken place between them as parties to such a transaction. When this agreement was sent to the defendant, a balance of 1332*l.* was actually due from Packer, he not having for a very considerable time settled for and paid up at the expiration of the current month. It is, however (in favour of the plaintiffs), further stated, that there was no evidence that the plaintiffs were aware that Packer had actually received the money from the customers. Now, whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not depends, as I think, on the question whether, in such a transaction as that described in the agreement it might, or might not, naturally be expected that the masters might have allowed a balance of this extent to accumulate, and to stand over unsettled for so long a time. In *Hamilton v. Watson* (12 Cl. & F. 109) the transaction was a security for a banker's cash account; and the decision of the House of Lords was, that in such a case it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not. In *Smith v. The Bank of Scotland* (1 Dow 272), where the security was given for the good behaviour of a bank agent, the effect of Lord Eldon's judgment is, that it was so little to be expected that a bank would continue in their service an agent who had already, by breach of trust, run into their debt, that the application for security amounted, as he says, to holding him forth to the sureties as a trustworthy person. It must in every case depend upon the nature of the transaction, whether the fact not disclosed is such that it is impliedly represented not to exist. That must generally be a question of fact proper for a jury. If in this case the amount of the balance already due had been small, or the period during which the accounts were left unsettled short, there would, in my opinion, have been such a mere scintilla of evidence as would not have warranted the jury in finding the verdict of fraud, and the Judge would have been justified in withdrawing the question from their consideration. But as it is, the amount of the balance already due being, relatively to the amount of the security, so large, and the period during which no settlement had taken place being so considerable, the Judge could not have withdrawn the case from the consideration of the jury; who might well come to the conclusion that the sending of the agreement, in these terms, amounted to an inaccurate representation. This would not be enough to support the verdict on the plea of Fraud, unless it was further established, that the plaintiffs made the inaccurate representation, intending to deceive the defendant, and induce him to enter into the contract in the belief that what was represented did exist, whilst the plaintiffs knew it did not exist. But of that also I think there was sufficient evidence. The improbability that any one could suppose that sureties would have entered into such an agreement, if they had known the truth, is so great, that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it. And, if the

jury so thought, they might from that alone have drawn the inference that the representation was fraudulently intended to deceive. This is strengthened by the facts that the plaintiffs apparently avoided having any personal communication with the proposed sureties, and sent the agreement for execution by an agent, who had no authority from them to make any statements; from which the jury might perhaps draw the further inference, that the plaintiffs took pains to avoid the risk of the sureties asking questions and being undeceived. It is not essential to constitute fraud that there should be any misleading by express words. It is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant to enter into the contract by leading him to believe that which the plaintiffs knew to be false, the plaintiffs knowing that if he had not been thus misled he would not have entered into the contract. For these reasons I think there was evidence to support the verdict; and consequently the judgment, in my opinion, should be affirmed.

BRAMWELL, B. I think this judgment should be reversed....To constitute fraud there must be—first, the assertion of something false, which is not the case here; or, secondly, the suppression of something true, where there is a duty or profession of stating everything material, and here there is no such duty; or, thirdly, a suggestion of falsity by statement of some facts and suppression of others which would qualify those stated. As if one should say “*A* was seized and died, *B* was eldest son, entered and enjoyed,” and suppressed that *A* had made a will and given *B* a life estate. To my mind there is nothing of that kind here. Perhaps, but most improbably, the defendant inferred or guessed that no arrears were due to the plaintiffs. I should not have so concluded: on the contrary, I should have concluded that there was some change in the circumstances of the parties which induced the plaintiffs to require further security. But supposing that the defendant’s was a right conclusion, and supposing that, if he could not inform himself further, he was justified in acting on it, I say that here he was not so justified. Because he might, if he cared to know them, have informed himself of the actual facts from the plaintiffs; as, if they had refused to tell him, he might have refused to be surety. I think a man has great right to complain of another who charges him with fraud, because he, the accuser, had not taken the trouble to make a few inquiries. I really can see no evidence of any fraud, of anything dishonest in this case....Packer was not a dishonest defaulter to the knowledge of the plaintiffs. He was liable to them to a large amount; every shilling of which might have been due from solvent debtors. The plaintiffs continued him a long time after in their service. They sent the agreement of suretyship to the defendant; and left it with him several days for him to make such inquiries as he thought fit. He makes none. Suppose he had asked and been told the truth, could anybody say that there had been any fraud or attempt at fraud?...

CROMPTON, J....To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existence of some untrue fact; but if it be made by one party in such terms as would naturally

lead the other party to suppose the existence of such state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms....It is not necessary for me to consider whether [if a juryman] I should have found fraud. We are only to decide whether there was evidence to go to the jury. The largeness of the sum in arrear; the improbability that the defendant would have become surety if he had known the real facts; the circumstances of the plaintiffs' not having seen the proposed sureties and merely having sent the papers to them....were, as it seems to me, matters entirely for the jury. I cannot say that the Court of Common Pleas were wrong in holding that there was some evidence for their consideration, and I therefore think that the judgment should be affirmed.

POLLOCK, C.B....It is said that there was in this matter concealment or misrepresentation. In fact, there was no representation at all, and therefore there could not be misrepresentation. And as to concealment, the plaintiffs never undertook to make any disclosure; and in my judgment were not under any legal or moral obligation to make any disclosure....Whether Packer made to his sureties a faithful and true representation of the state of his affairs is entirely a matter of indifference. If he did, then they have no ground of complaint at all; if he did not, it is no fault of the plaintiffs. The defendant has trusted Packer, whom the plaintiffs would trust no longer; and Packer has deceived the defendant. But the plaintiffs never directly or indirectly made any communication to the defendant on the subject of the state of the accounts. It was, however, manifest that the plaintiffs required further security, and retrospective security. It was therefore the duty rather of the sureties to inquire, than of the plaintiffs to inform them, what was the state of the accounts. In my opinion, there is a total absence of any evidence of fraud, and no just ground for any suspicion of it.

[Four judges were in favour of affirming the judgment; against two dissentients.]

Judgment affirmed.

DERRY AND OTHERS, APP. v. PEEK, RESP.

HOUSE OF LORDS. 1889.

L.R. 14 A.C. 337.

[*Action of Deceit—Misrepresentation in Prospectus.*]

By a special Act (45 & 46 Vict. c. clix.) the Plymouth, Devonport and District Tramways Company was authorized to make certain tramways.

By sect. 35 the carriages used on the tramways might be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power for fixed periods and subject to the regulations of the Board. By sect. 34 of the Tramways Act 1870 (33 & 34 Vict. c. 78), which section was incorporated in the special Act, "all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only."

In February 1883 the appellants as directors of the company issued a prospectus containing the following paragraph: "One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Soon after the issue of the prospectus the respondent, relying, as he alleged, upon the representations in this paragraph and believing that the company had an absolute right to use steam and other mechanical power, applied for and obtained shares in the company. The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramways. In the result the company was wound up. The respondent in 1885 brought an action of Deceit against the appellants, claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

At the trial, the plaintiff and defendants were called as witnesses. Stirling, J., dismissed the action; but that decision was reversed by the Court of Appeal; who held that the defendants were liable to make good to the plaintiff the loss sustained by his taking the shares (L.R. 37 Ch. D. 541). Against this decision the defendants appealed....

LORD HALSBURY, L.C....To quote the language, now some centuries old, in dealing with actions of this character, "Fraud without damage or Damage without fraud" does not give rise to such actions.

When I turn to the question of fact I confess I am not altogether satisfied. In the first place I think the statement in the prospectus was untrue—untrue in fact, and to the minds of such persons as were likely to take shares, I think, well calculated to mislead. Such persons would have no idea of the technical division between tramways that had rights to use mechanical means and tramways that had not. What I think they would understand would be that this particular tramway was in an exceptionally advantageous position—that the statement was of a present existing fact, that it had at the time of the invited subscription for shares the right to use steam. And I think such a statement if wilfully made with the consciousness of its inaccuracy would give rise to an action for deceit, provided that damage had been sustained; if a person had acted upon a belief induced by such a prospectus. But the learned judge, who saw and heard the witnesses, acquitted the defendants of intentional deceit. And although the Court of Appeal held them liable, they appear to me to have justified their decision upon grounds which I do not think tenable; namely, that the directors were liable because they had no reasonable ground for the belief, which nevertheless it is assumed they sincerely entertained....If the facts are reconcilable with the innocence of the directors, and with the absence of the *mens rea* which I consider an essential condition of an action for deceit, the mere fact of the inaccuracy of the statement ought not to be pressed into constituting a liability which appears to me not to exist according to the law of England.

As to the question whether Sir Henry Peek was induced to take his shares by reliance on the misleading statement, I admit that I have very considerable doubt. On the one hand, I do not believe that any one can so far analyse his mental impressions as to be able to say what particular fact in a prospectus induced him to subscribe. On the other hand the description by Sir Henry Peek (even now that the question has been pointedly raised and brought to his mind) of what did or did not induce him to take his shares is hardly reconcilable with his having been substantially induced by the statement in question to take them.

On the whole I acquiesce in the judgment that the judgment appealed from be reversed.

LORD WATSON. I agree with Stirling, J., that, as matter of fact, the appellants did honestly believe in the truth of the representation upon which this action of deceit is based. It is by no means clear that the learned judges of the Court of Appeal meant to differ from that conclusion. But they seem to have held that a man who makes a representation with the view of its being acted upon, in the honest belief that it is true, commits a fraud in the eye of the law, if the court or a jury shall be of opinion that he had not reasonable grounds for his belief. I have no hesitation in rejecting that doctrine, for which I can find no warrant in the law of England.

LORD BRAMWELL....We need not trouble ourselves about "legal fraud," nor whether it is a good or bad expression. Because I hold that actual fraud must be proved in this case to make the defendants liable, and, as I understand, there is never any occasion to use the phrase "legal fraud" except when actual fraud cannot be established. "Legal fraud" is only used when some vague ground of action is to be resorted to, or, generally speaking, when the person using it will not take the trouble to find (or cannot find) what duty has been violated or right infringed, but thinks a claim is somehow made out. I think it a mischievous phrase, and one which has contributed to (what I must consider) the erroneous decision in this case.

Now, I really am reluctant to cite authorities to shew that actual fraud must be established in such a case as this. It is one of the first things one learned, and one has never heard it doubted until recently. When a man makes a contract with another he is bound by it; and, in making it, he is bound not to bring it about by fraud. *Warrantizando vendidit* gives a cause of action if the warranty is broken. Knowingly and fraudulently stating a material untruth which brings about, wholly or partly, the contract, also gives a cause of action. To this may now be added the equitable rule (which is not in question here), that a material misrepresentation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission. To found an action for damages there must be a contract and breach, or fraud. The statement of claim in this case states fraud. No one ever heard of or saw a statement of claim or declaration for deceit without it.

The alleged untrue statement is that, "The company has the right to use steam or mechanical power instead of horses," and that a saving would be thereby effected. Now, this is certainly untrue; because it is

stated as an absolute right, when in truth it was conditional on the approval of the Board of Trade and the consent of two local boards. A conditional right is not the same as an absolute right. It is also certain that the defendants knew what the truth was, and therefore knew that what they said was untrue. But it does not follow that the statement was fraudulently made. There are various kinds of untruth. There is an absolute untruth, an untruth in itself, that no addition or qualification can make true; as, if a man says a thing he saw was black, when it was white, as he remembers and knows. So, as to *knowing* the truth. A man may know it, and yet it may not be present to his mind at the moment of speaking; or, if the fact is present to his mind, it may not occur to him to be of any use to mention it. For example, suppose a man was asked whether a writing was necessary in a contract for the making and purchase of goods, he might well say, "Yes," without adding that payment on receipt of the goods, or part, would suffice. He might well think that the question he was asked was whether a contract for goods to be made required a writing like a contract for goods in existence. If he was writing on the subject he would, of course, state the exception or qualification.

Now, consider the case here. These directors naturally trust to their solicitors to prepare their prospectus. It is prepared and laid before them. They find the statement of their power to use steam without qualification. It does not occur to them to alter it. They swear they had no fraudulent intention. At the very last they cannot see the fraud. There is their oath, their previous character unimpeached, and there is to my mind this further consideration: the truth would have served their purpose as well. "We have power to use steam, etc., of course with the usual conditions of the approval of the Board of Trade and the consent of the local authorities, but we may make sure of these being granted, as the Board of Trade has already allowed the power to be inserted in the Act, and the local authorities have expressed their approbation of the scheme." (See plaintiff's answer, 313, which shews that he would have been content with that statement.)...

I think, with all respect, that in all the judgments [in the Court of Appeal] there is a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action. I think it is most undesirable that actions should be maintainable in respect of statements made, unreasonably perhaps but, honestly. I think it would be disastrous if there was "a right to have true statements only made." It might, perhaps, be well to enact that in prospectuses of public companies there should be a warranty of the truth of all statements, except where it was expressly said there was no warranty¹. The objection is to exceptional legislation, and to the danger of driving respectable and responsible men from being promoters, and of substituting for them those who are neither.

¹ [EDITOR'S NOTE. The legislature, in the very next year, acted upon this view; passing the Directors' Liability Act, 1890 (now replaced by s. 84 of the Companies Consolidation Act, 1908); enlarging the responsibility of the promoters and the directors of Companies for statements made in the prospectuses issued by them.]

In this particular case I hold that unless fraud in the defendants could be shewn, the action is not maintainable. I am satisfied there was no fraud. Further, if an unreasonable misstatement were enough, I hold there was none. Still further, I do not believe that the plaintiff was influenced by the misstatement; though I am entirely satisfied that he was an honest witness.

LORD FITZGERALD....One characteristic seems to pervade each of the judgments in the Court of Appeal, viz. that the *bonâ fide* belief of the defendants in the truth of the representation was unavailing unless it was a reasonable belief resting on reasonable grounds. If this is correct, it seems to me that in an action for "deceit" it would be necessary to submit to the jury (if tried before that tribunal) not only the existence of that belief *bonâ fide*, but also the grounds on which it was arrived at, and their reasonableness.

I am by no means satisfied that such is the law, and if now driven to express an opinion on it, I would prefer following the opinion of Lord Cranworth in *Western Bank v. Addie* (L.R. 1 H.L. Sc. 168): "I confess that my opinion was that in what his Lordship (the Lord President) thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs, which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to shew that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true but of their having stated as true what they did not believe to be true."

A director is bound in all particulars to be careful and circumspect, and not, either in his statements to the public or in the performance of the duties he has undertaken, to be careless or negligent, or rash. Want of care or circumspection, as well as recklessness, may in such a case as the present be taken into consideration in determining at every stage the question of *bonâ fides*.

The decision of the Court of Appeal should be reversed.

LORD HERSCHELL. This action is one which is commonly called an action of deceit, a mere common law action. This is the description of it given by Cotton, L.J., in delivering judgment. Such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. Where rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite....There

is another class of actions which I must refer to also; for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes v. Lock* (10 Ves. 470) is an example; where a trustee had been asked, by an intended lender upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action....

[In the Court of Appeal, in the present case, all] the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true; but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. The Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided.

[After an exhaustive review of the decided cases, Lord Herschell proceeded:] I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false¹ representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. (Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief.) Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made....

At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too,

¹ [EDITOR'S NOTE. For the three forms of Falsity, see p. 260 *supra*.]

although means of knowledge are a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that *honest* belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

It now remains for me to apply what I believe to be the law to the facts of the present case. The charge against the defendants is that they fraudulently represented that by the special Act of Parliament which the company had obtained they had a right to use steam or other mechanical power instead of horses. The test which I purpose employing is to inquire whether the defendants knowingly made a false statement in this respect, or whether, on the contrary, they honestly believed what they stated to be a true and fair representation of the facts....The learned judge who tried the cause, and who tells us that he carefully watched the demeanour of the witnesses and scanned their evidence, came without hesitation to the conclusion that they were witnesses of truth, and that their evidence, whatever may be its effect, might safely be relied on. I shall therefore assume the truth of their testimony....

They were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement; or one which he did not believe to be true; or was careless whether what he stated was true or false. I think they honestly believed that what they asserted was true; and I am of opinion that the charge of fraud made against them has not been established.

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test; with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true. I have come to the conclusion that the statement, though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and *bonâ fide* statement on the part of the defendants, and by no means exposes them to an action for deceit.

I think the judgment of the Court of Appeal should be reversed.

Order of the Court of Appeal reversed.

[EDITOR'S NOTE. This decision was followed in *Thiodon v. Tindall* (60 L.J.R., Q.B. 526). Lloyd's Committee had given to the owner of a yacht a certificate which exaggerated the yacht's merits. Misled by this, T. bought the yacht from that owner at an excessive price. On discovering the error, T. sued the Committee. They were held not to be liable to him. For (1) there was no Fraud; and (2) since there was no contract between them and him, there was no Duty to him to be careful in making out the certificate.]

SECTION III

FRAUD

HARVEY v. YOUNG.

KING'S BENCH. 1597.

YELVERTON, 20.

[*Representation as to value.*]

J. S. had a term for years. There being a discourse between him and *J. D.* about buying that term, *J. S.* said and affirmed to *J. D.* that the term was worth 150*l.* to be sold, upon which *J. D.* gave *J. S.* 150*l.* for the term. And afterwards *J. D.* endeavoured to sell the term again, and could not obtain for the term 100*l.* Whereupon he brought an action on the case in nature of a Deceit against *J. S.*; and declared *ut supra*, and that *J. S. asservit* to him that the term was worth so much, to which assertion *J. D., fidem adhibens, did buy the term* for so much money, but could not sell it again for so much money as was given at first: in fraud and deceit of the plaintiff to his damages, etc. Upon "Not guilty" pleaded, it was found for the plaintiff. Alleged in arrest of judgment, that the matter precedent did not prove any fraud. For it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such value to be sold, and the plaintiff had thereupon given and disbursed his money, there it is otherwise. For the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff¹.

¹ [This distinction is described by Lord Hardwicke in *Cleeve v. Gascoigne* (Amb. 323), in the following manner: "Though when a man affirms a thing to be so, which is otherwise, it is a falsity and fraud in him, whether he knew it or not; yet that must be understood with a distinction. Where the affirmation is of a fact which is in itself certain, as of the loss or missing of a ship, or that such a farm is let at so much, it is so. But where it is matter of opinion, as of the state of health of any person, or of the value of a farm that is unlet, it is not so." Note by Mr Finch.]

RISNEY v. SELBY.

QUEEN'S BENCH. 1705.

1 SALKELD, 211.

[False statement as to rent.]

CASE, for that the plaintiff, being in treaty with the defendant about the purchase of such a house, the defendant did fraudulently affirm the rent to be 30*l. per annum*, whereas it was but 20*l.*; whereby he was induced to give so much more than the house was worth. Upon not guilty pleaded; and verdict for the plaintiff; it was moved in arrest of judgment, that this was an improper inquiry in the plaintiff, and he was over-credulous in taking the defendant's word for it. But the plaintiff had his judgment; for the value of the rent is matter that lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it.

WARD, APP. v. HOBBS, RESP.

HOUSE OF LORDS. 1878.

L.R. 4 A.C. 13.

[Sale in Market—Statutory Requirements.]

[IN August, 1875, Hobbs was possessed of a herd of about ninety pigs, forty of which were sold to a Mr Farmer, a miller. Farmer afterwards, on September 9th, complained to Hobbs that the pigs purchased from him scoured, and it was alleged that scour and want of appetite were symptoms of typhoid fever in pigs. Hobbs denied that he knew anything about the pigs being ill or affected in any way. On that 9th of September, Hobbs sent to the Newbury market thirty-two of his pigs, to be there sold by auction; Hobbs would not give any warranty with them. Among the conditions of sale were the following:

"4. The lots, with all faults and errors of description (if any), to be paid for and removed at the buyer's expense immediately after the sale."

6. No warranty will be given by the auctioneer with any lot, and, as all lots are open for inspection previous to the commencement of the sale, no compensation shall be made in respect of any fault, or error of description, of any lot in the catalogue."

An inspector of the market made his report in the usual way; saying that he had not observed anything objectionable in the pigs. Ward bought the thirty-two pigs at the auction, and paid £44 for them, which was a fair price at that time and place for healthy pigs. They exhibited symptoms of illness on being driven to the plaintiff's farm, and all but one of them afterwards died of typhoid fever, and the plaintiff also lost some other pigs which he had bought of other people, and which he asserted had been infected with disease from Hobbs' pigs. He thereupon brought an action for damages to recover compensation for the loss he had thus suffered, and in his statement of claim suggested a warranty¹,

¹ The words were: "The Plaintiff says, that by warranting certain pigs to be free from any infectious disease, the Defendant sold thirty-two of such pigs to the Plaintiff at and for the sum of £44."

and alleged that the pigs had been sent for sale at an open and public market at Newbury.

On the part of the defendant there was the most positive denial that he knew, or even suspected, that the pigs were tainted with disease; and the sickness of the pigs on the way from market to the plaintiff's farm, was attributed to their being driven a considerable distance without food being supplied to them on the road. No veterinary surgeon had seen them until after death, so that he could form no idea as to the time at which the disease had first attacked them. Some evidence was given with a view to shew that the defendant had been aware, before he sent the pigs to Newbury on the 9th of September, that they were infected with the disease. On the other hand the defendant's son was called as a witness, and swore that it was his duty to look after these pigs, that he had done so, and that he never had any reason to believe that they were suffering from any disease. The defendant's counsel relied upon the absence of any evidence of warranty, or of fraud, or deceit, or of false representation, or of the fact that the pigs were diseased at the time of the sale....Brett, J., asked the jury whether the defendant knew that his pigs had a dangerous and infectious disease. The jurors returned a verdict for the plaintiff, and assessed damages, in respect of the loss of the thirty-one pigs and of the sixteen other pigs, at £66. Leave to move to enter a verdict for the defendant was reserved. The motion was made in the Queen's Bench and the rule discharged (L.R. 2 Q.B.D. 331). The case was taken to the Court of Appeal, where the decision of the Court below was reversed and judgment entered for the defendant (L.R. 3 Q.B.D. 150). This appeal was then brought.]

Mathews, Q.C., for the appellant. There was evidence to go to the jury that the defendant knew that the pigs were suffering from a contagious disease at the time of the sale; and that he had acted in a manner calculated to deceive the dealers in the market, and for the purpose of deceiving them. Assuming the proof of his knowledge to be sufficient, then he was liable in damages, notwithstanding the absence of any direct warranty as to soundness. For his sending them to market under such circumstances was by the 32 & 33 Vict. c. 70¹, forbidden in express terms; and was an illegal act the doing of which subjected him to penalties. His sending them to market must therefore be treated as a representation that he was not doing what the statute forbade; and amounted to a representation which deceived the plaintiff into the belief that the pigs were fit objects of sale and purchase. Any one honestly acting on that representation, and then suffering from it because he had been deceived by it, as it was false, had a right of action in respect of the damage he thereby suffered. The violation of a statutory duty, if it occasioned damage to an individual, gave him a right to recover damages. Now here the evidence was strong to shew that the defendant knew that the pigs were diseased, and the jury had found that to be the fact.

[THE LORD CHANCELLOR referred to *Hill v. Balls* (2 H. & N. 299).]

¹ [EDITOR'S NOTE. Now repealed: and superseded by the Diseases of Animals Act, 1894, which enables (what is now) the Ministry of Agriculture and Fisheries to make Orders that have the force of law on this subject.]

That case might be accounted for by the fact, that the declaration alleged a sale of a glandered horse, but did not state anything which shewed that the sale had been made in a place or manner forbidden by the statute. Here the statement of claim alleged that the pigs had been sent to "an open and public market at Newbury."

The defendant here must be treated as having made a misrepresentation on the subject, and must be subject to all the consequences of making it. Here negligence was out of the question, for these pigs had been wilfully sent to market, and the *scienter* was abundantly proved here. *Baglehole v. Walters* (3 Camp. 154) was not applicable; for there, though the defendant knew of the defective state of the ship he offered for sale, and on that account would have been held liable, the ship was open to inspection, the defects in it were visible, and might have been seen at once by any one; while here the disease must be unknown to any purchaser, for no one could, by mere inspection, make himself acquainted with the fact of its existence. In *Bodger v. Nichols* (28 L.T. 441), the defendant succeeded on the ground that there was no sufficient evidence that he had any knowledge that the cow he sold was diseased; but in the course of his judgment there, Mr Justice Blackburn said: "I entertain no doubt, but it is not necessary to decide the point, that the defendant, by taking the cow to a public market to be sold, though he does not warrant her to be sound, yet thereby furnishes evidence of a representation that, so far as his knowledge goes, the animal is not suffering from any infectious disease. To say otherwise would be to run counter to the common sense of mankind."

A representation, such as sending the pigs to a public market must be taken to be, subjects the offending party to criminal, and ought to subject him to civil, responsibility. In *Rex v. Bernard* (7 C. & P. 784), a person at Oxford went into a shop attired in the cap and gown of a [member] of a college, and so obtained goods; and that was held to be a representation which, being false, subjected him to an indictment. In some cases a smaller matter had been held to make a party liable for the act of his agent....In *Jones v. Bowden* (4 Taunt. 847) where there was (not a statutory duty but merely) a custom of the trade to announce that goods had been damaged by sea-water and re-packed, and goods which had been so damaged and re-packed were sold without that notification, although the goods were left open for inspection, the seller was held liable to the purchaser for damage.

In *Shepherd v. Kain* (5 B. & A. 240) a ship was described as "copper-fastened," but it was expressly declared that it was to be taken "with all faults"; it was open to inspection; it was purchased by the plaintiff, who proved at the trial that it was not what was called in the trade a "copper-fastened" vessel. Notwithstanding the restriction as to taking it with "all faults," the seller was held liable. The offering of the pigs for sale was in this case an implied warranty that they were fit to be sold as pigs; it was certainly a representation which made the vendor liable. Even the gratuitous permission to use a thing—a loan of it—has been held to imply a warranty that it was fit for the use for which it was lent, and if injury followed from its known unfitness the lender has been held liable: *Blakemore v. The Bristol and Exeter Railway Company*

(8 E. & B. 1035). The knowledge was the principle on which the Court proceeded....The principle of the cases is that if the seller had reason to doubt the soundness of the article sold, still more if he believed it to be unsound, he was responsible. Here the conduct of the defendant shewed that he must have known that his pigs were infected, so he sent them to market, did not himself appear as their seller, but employed an auctioneer, and refused any warranty. The case was one peculiarly fit for the decision of a jury, and the jury felt no hesitation in declaring the defendant liable as a person who had sold with a full knowledge of the real state of the animals he sold.

LORD CAIRNS, L.C....If the pigs were infected with this disease at the time of the sale, and the respondent knew it, then beyond all doubt the respondent was, both morally and legally, highly culpable. But the question is, Is there a right of action on the part of the appellant?

Now the appellant in his claim puts the case in this way: he says that by warranting the pigs to be free from any infectious disease the defendant induced him to buy them; and then he alleges that "even if the defendant did not warrant the pigs, the defendant either knowingly, or having good reason for believing that the pigs were suffering from an infectious disease, offered them for sale at a certain open and public market held at Newbury, and sold thirty-two of them to the plaintiff for £44"; then he says that "the defendant knew that the plaintiff was a farmer, and that the pigs would be placed with other pigs, and would also be turned into certain stubble fields."

Now with regard to the allegations in the statement of claim, undoubtedly there was no warranty, and the case in that respect is unsupported. As to the other allegation in the claim that, *simpliciter*, from the fact of his sending the pigs when they were in this state to the market, a right of action arises, that was not mainly, if at all, the ground upon which the case was rested at your Lordship's Bar. The great contest was this: the appellant contended that the respondent had made a representation which was untrue in point of fact, and that the action lay as in the nature of an action for deceit. If a man expressly states upon a sale, that he gives no warranty and that the goods sold must be taken with all their faults, but goes on expressly to say, in addition, that so far as he knows, or believes, or has reason to believe, the goods are free from any particular fault, and that the animals are free from any disease, then if it can afterwards be proved that to his knowledge the animals were tainted with the disease to which he referred, there can be no doubt that, notwithstanding the negation of warranty, an action would lie for deceit, for the false representation. There is no difficulty in reconciling these two express statements, viz., the one express statement that he does not warrant and that the property must be taken with its faults, and the other express statement that so far as he knows or believes, the article sold is free from a particular fault. But the question here is, not how two express statements of the kind that I have described are to be made to stand together, but whether, in addition to the express negation of warranty, there was any other representation at all. Any representation in words there clearly was not in this case....

But what was contended at your Lordships' Bar was this, that al-

though there was no express representation in words, yet there was conduct on the part of the respondent which amounted to a representation. There is an Act of Parliament, the Contagious Diseases (Animals) Act which enacts (s. 57) that any person who sends an animal [affected with] an infectious or contagious disease, to any public or open place, shall be guilty of an offence under the Act, unless he shall prove that he was not aware that the animal was so tainted with disease. It was said, therefore, that the respondent here, from the mere fact of sending his pigs into a public market, must be taken (being of course held to be aware of the law upon the subject), to be representing that he was not infringing the law, and that the animals were not tainted with any infectious or contagious disease.

In *Bodger v. Nichols*, Lord Blackburn seems to have thrown out an opinion that there being nothing in the shape of statement or negation, and there being simply the fact of a man sending diseased animals to a public market to be sold, that must be held to be a representation by conduct that the animals were free from disease; and that the person so sending them might be liable for the consequences of that representation, if it turned out to be untrue¹. I desire to hold myself unpledged if such a case had to be considered. But that is not the case which your Lordships have now to consider. You have here an actual, clear, unqualified statement, in writing, on the one hand; and no statement whatever, even in mere words, upon the other hand, but an attempt to raise a conclusion as to an implied statement from conduct. The words of the statement on the one side are perfectly clear; they are that the vendor will not warrant the goods, and that the purchaser must take them with all their faults. In order to countervail or qualify that, there must be something as clear in statement in an opposite direction. If, notwithstanding that negation of warranty the vendor said that he believed the animals were free from disease, that might be the foundation of an action for deceit. But it seems to me that there is no authority and no principle upon which, in the face of a clear and unqualified statement, that the purchaser must take the articles with all their faults, you are to raise, from the mere circumstances of his sending the animals to the market, the implication of a representation on the other hand that the animals were, in the belief of the vendor, free from disease.

I, therefore, on this part of the case entirely agree with that which was the unanimous conclusion of the Court of Appeal.

But there were some minor points in the case suggested as arguments.

The first of these subsidiary points was this: it was said that there was here a breach of statutory duty, and that wherever you have a breach of a statutory duty and any person wronged by it, the person wronged has a right of action. Now I do not stop to consider how far that proposition can be supported as a general proposition; a good deal might be said upon that subject. But it is sufficient in the present case to point out that the statutory duty here is a duty not to send infected animals into a public place; (for an obvious reason, lest they should by neighbourhood taint other animals and thereby occasion injury to the

¹ [EDITOR'S NOTE. Cf. *Freeman v. Cooke*, *supra*, p. 246.]

public). If in that state of things some person had come forward and said, "You, the respondent, sent tainted animals into this public place, and my animals, in that public place, by neighbourhood were infected; and I suffered a loss," then I could understand the argument. But that is not what occurred here. What occurred in the public place was the buying and the selling, and no tainting of other animals; (although it is said that after the pigs became the property of the purchaser and were taken to his farm they tainted other animals which were there). That is not the gist of the enactment, and therefore it appears to me that this argument altogether fails.

The next subsidiary point was this: it was said that that which was sold here (this I think was rather a figurative expression than a serious argument) was not really a lot of pigs but a mass of disease—of typhoid fever. To that all I can say is, that a pig having typhoid fever appears to me not to lose its identity any more than a man having typhoid fever ceases to be a man; and therefore the thing sold was that which it was professed to sell.

Then again it was said that what was sold here was not merely infected by disease, but was a noxious and dangerous thing, certain to be a source of evil and danger wherever it might be carried. It was likened to the case of a person selling explosive substances without any warning being given to the purchaser, and without its being known or being made clear that the possession of the substances was attended with danger. There again I should not wish to express any opinion as to how far that argument might be urged in a case where there was no express statement upon the subject of the thing sold. It is sufficient to say that it seems to me that where you have an article sold with a statement, not merely that the vendor does not warrant it, but that the purchaser must take it with all its faults, this point really becomes a branch of the first point to which I have referred. You cannot therefore contend that the purchaser is afterwards to be at liberty to turn round and say, "There was this fault in the article which I bought which makes it a dangerous article for me to become the possessor of."

* * * * *

LORD SELBORNE....To say that every man is always to be taken to represent, in his dealings with other men, that he is not, to his knowledge, violating any statute, is a refinement which (except for the purpose of producing some particular consequence) would not I think appear reasonable to any man.

The argument which, for some time, most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so, but I know no authority for the proposition that such is the law; even with respect to the particular case of infectious disease in animals sold. The very nature of the condition that the buyer is to take the animals with all faults

implies that they may be diseased, without any distinction between infectious and non-infectious disease.

Appeal dismissed.

[EDITOR'S NOTE. The question, left unsettled in this case, as to the effect of mere non-disclosure of the noxiousness of an article sold—an explosive, a poisonous drug, a diseased animal—must be considered by the student in the light of the recent tendency of English judicial opinion to copy the stringency of American courts. Cf. *Dominion National Gas Co. v. Collins* (L.R. 1900, A.C. 640). For the American doctrine, see *Thomas v. Winchester*, in *Kenny's Select Cases in Tort*, pp. 638-640.]

POLHILL v. WALTER.

KING'S BENCH. 1832.

3 B. & AD. 114.

[*False statement without evil motive.*]

[WALTER, the defendant, had formerly been in partnership with a man called Hancorne, but was not so at the time of the present transaction. Hancorne, however, still kept a counting-house on the premises where the defendant carried on business. A bill of exchange drawn upon Hancorne by a Mr Fox of Pernambuco, was left for acceptance at that place; and, afterwards, a banker's clerk, accompanied by a Mr Armfield, then a partner in the house of the payees, called for the bill. The defendant stated that Hancorne was out of town, and that it had better be presented again. This the clerk refused, and said it would be protested. Armfield then represented to the defendant that expense would be incurred by the protest, and assured him that it was all correct; whereupon the defendant, acting upon that assurance, accepted it "per procuration of Hancorne." After this acceptance, it was indorsed over by the payees. On the return of Hancorne, he expressed his regret at the acceptance, and refused to pay the bill. Polhill, the last indorsee of the bill, sued Hancorne; but on Walter's giving evidence of the above circumstances, was nonsuited. The present action was brought to recover the amount of the bill, and the costs incurred in that action. The declaration contained two counts. First, that the defendant falsely fraudulently and deceitfully represented that he had authority to accept the bill on behalf of Hancorne; second, that it was the defendant's duty to pay the bill *as acceptor* thereof. The defendant's counsel contended that as there was no fraudulent or deceitful intention on the part of the defendant, he was not answerable. Lord Tenterden was of that opinion, but left it to the jury to determine whether there was such fraudulent intent or not; and directed them to find for the defendant if they thought there was no fraud, otherwise for the plaintiff. The jury found a verdict for the defendant¹. The plaintiff moved to have the verdict entered for him.]

¹ [EDITOR'S NOTE. "It is plain, however," said Lord Herschell, commenting upon this case, in *Derry v. Peek*, "that all that was meant by this finding of the jury was, that the defendant (Walter) was not actuated by any corrupt or improper motive."]

Campbell, for defendant. The jury having negatived all fraud and deceit, it must now be assumed that the defendant, when he represented that he had authority to accept the bill, *bonâ fide* believed that he had such authority; and if that be so, he is not liable in this action by an indorsee. As to the first count, striking out the allegation of fraud, the... question is, whether a party who accepts a bill in the name of another, representing that he has authority so to do (which he has not, but which he believes he had) makes himself liable to every person who takes that bill? There is no authority to support such a position. Would the defendant, if he had acted under a power of attorney, purporting on the face of it to be executed by Hancorne, but which turned out to be forged, have been liable to any person who afterwards took the bill? If he be liable at all, he must be so by some contract, or by reason of the custom of merchants. Here there was no contract between the plaintiff and defendant, and there was no proof of any custom of merchants which would make him liable. But the second count will probably be relied upon. It alleges that it became the duty of the defendant to pay it as the acceptor thereof....Is it by law the duty of a person who accepts a bill in the name of another, believing that he has authority from that other to do so, to pay that bill as the acceptor, in default of payment by the other party? Here was no contract between the plaintiff and defendant, upon which such a duty could be grounded. And the declaration does not allege that the defendant became liable as acceptor by the custom of merchants, nor was there proof of any such custom. By the general custom of merchants a person may accept in his own name "for the honour" of the drawer or indorser; but, in that case, the person so accepting is not liable, unless the bill be first presented to the drawee when due.

Sir James Scarlett, for plaintiff. First, assuming that the defendant was not guilty of fraud, in any sense of that word, he was liable, as acceptor....And the defendant accepting per procuration, and knowing that he had no authority, must be taken to have meant that the bill should be paid by somebody, either by the party in whose name it was accepted or by himself. That is, in substance, the acceptance of a bill of exchange. In the American Courts, a pretended agent who signed a note for another as having authority, was held personally liable as maker. Secondly, the first count of the declaration was proved. The jury have, indeed, negatived fraud in fact; they have found that the defendant thought Hancorne would pay the bill; and that he did not mean to cheat any person. But still the defendant, by accepting a bill per procuration of another, has represented to all the world that he had authority from that other to do so, whereas he had no such authority. That representation being false to his knowledge, is a fraud in law....

LORD TENTERDEN, C.J....Two points were made by the plaintiff's counsel. It was contended, in the first place, that although the defendant was not guilty of any fraud or deceit, he might be made liable *as acceptor* of the bill; that the second count was applicable to that view of the case. But no one can be liable *as acceptor* but the person to whom the bill is

addressed, unless he be an acceptor for honour¹; which the defendant certainly was not. This distinguishes the present case from that of a pretended agent, making a promissory note. Indeed, it may well be doubted if the defendant, by writing this acceptance, entered into any *contract or warranty* at all that he had authority to do so. And if he did, it would be an insuperable objection to an action as on a contract by this plaintiff, that at all events there was no contract with *him*.

It was in the next place contended that the allegation of *falsehood and fraud* in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff. It was said to be enough if a representation is made which the party making it *knows to be untrue*; and which is intended by him (or which, from the mode in which it is made, is calculated) to induce another to act, on the faith of it, in such a way as that he may incur damage; and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, *a fraud*; and for this position was cited the case of *Foster v. Charles* (7 Bing. 105)². The principle appears to us to be well founded, and to apply to the present. It is true that there the representation was made *immediately* to the plaintiff, and was *intended* by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to *all* to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to *all*, and the plaintiff is one of those. And the defendant must be taken to have *intended*, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation; because that, in the ordinary course of business, is its natural and necessary result.

If, then, the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did) the representation was untrue to his knowledge, and an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true (as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery), he would have incurred no liability³. For he would have made no statement which he knew to be false: a case different from the present, in which

¹ [EDITOR'S NOTE. This ruling was approved in *Eastwood v. Bain* (28 L.J.R., Ex. 74).]

² [EDITOR'S NOTE. In which it was said by Tindal, C.J., "It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motives from which the representations proceeded may not have been bad; the party who makes such representations is responsible for the consequences."]

³ [EDITOR'S NOTE. This exception in favour of honest mistakes is no longer recognised. "It is utterly immaterial for...this branch of law...whether the supposed agent knew of the defect in his authority or not," *per* Lord Davey in *Starkey v. Bank of England* (L.R. [1903] A.C. 114). He was dealing with the actual case of an agent

it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions, that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an *accepted* bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss. The rule should be made absolute to enter a verdict for the plaintiff.

SMITH v. REESE RIVER COMPANY.

CHANCERY. 1866.

L.R. 2 Eq. 264.

[*Company—Prospectus—Reckless Misrepresentation.*]

THE plaintiff had received a prospectus of the Reese River Silver Mining Company, Limited, incorporated under the Companies Act, 1862, with a capital of £100,000 in 20,000 shares of £5 each. The prospectus, after calling attention to the unbounded wealth of Nevada as a great and recognised fact, and the marvellous purity of the silver extracted from the chloride ores of the region, proceeded as follows:

“The property which this company has contracted for consists of about fifty acres of land, containing several very valuable claims, some of which are in full operation, and making large daily returns....The success which has attended all the local companies working the silver ores on all sides of these mines is verified by official documents; and the proprietor (who has amassed a large fortune during the last eighteen months by working a few of the claims upon the property contracted to be transferred to this company) has, to shew his confidence in the prosperity of the company, agreed to receive the purchase-money in fully paid-up shares only.”

The prospectus, after some further statements as to the unparalleled richness of the silver lodes found in the Reese River district, the pastoral and agricultural resources, and the like, stated that the articles of association and a map of the district could be seen at the company's offices, where further information might be obtained. The memorandum and articles of association, both dated the 5th of June, 1865, stated the objects of the company thus:—

“To mine for the precious metals...and generally the carrying on the business of a mining, smelting, and crushing company—the doing of all other things whatsoever which the company from time to time may think conducive to the attainment of any of those objects.”

acting under a forged power of attorney, which he supposed to be genuine. See, p. 332 *infra*, *Collen v. Wright*, and the note to it; shewing that the liability is now regarded as depending, not on Fraud, but on Warranty.]

Powers were given to the directors to manage the business of the company and (Clause 111): "to adopt and carry into effect or rescind, upon terms or otherwise, any contract whether already made or hereafter to be made, by or on behalf of the company, as the directors may in their discretion deem expedient. A certain agreement made between Mr Peter Aaris of the first part, and the subscribers of the memorandum of association hereunto annexed, is hereby confirmed."

(Clause 113.) "The directors may from time to time purchase or acquire the business and property, or any part of the business or property of any company, partnership, or person carrying on any business included among the objects for which the company is established, upon such terms as the directors may think fit."

The agreement with Mr Aaris was a provisional contract for the purchase of the mine referred to in the prospectus.

On the faith of the statements contained in the prospectus, the plaintiff obtained an allotment of 100 shares in the company; and on the 2nd of August, 1865, having paid a sum of £200, he received a certificate of being registered as the proprietor of the 100 shares. On December 30th, 1865, he received notice of a call of £1 per share, accompanied by a copy of what was termed "a most satisfactory letter received this day from our deputation on their return from the mines at Reese River."

From this letter, and a subsequent report, it appeared that the deputation had found on reaching the estate, after many dangers and difficulties, that the property contracted to be purchased was not only inferior to the representations made, but actually worthless. They considered, however, that this realisation of their worst expectations was matter for rejoicing, and that they had been fully compensated by purchasing "one of the best (if not the finest) mines in the Reese River district, at the mere nominal price of 36,000 dollars"—consisting (not of fifty acres, the dimensions of the property alluded to in the prospectus, but) of "1200 feet of the great extension of the famous Confidence mine ledge, the vein of which is the truest, largest, and richest in the Reese River district." The letter and report contained numerous statements as to the richness of the property purchased in substitution for that which had been originally contracted for.

The plaintiff declined to pay the call of £1 per share on the ground that he had taken his shares and paid £200 entirely on the faith that the statements contained in the prospectus were correct, and, in particular, in the full belief that the statements with reference to the property contracted for by the company were accurate, and were within the knowledge of the directors. The present bill was filed for the purpose of having the plaintiff's name removed from the register of shareholders, to obtain repayment of the £200, and to restrain all proceedings for the recovery of the call.

From the affidavit of the directors, filed in opposition to the motion, it appeared that early in 1865 one William Jones was introduced by a Mr Anderson to Mr Aaris, a broker in the city, as the owner of very valuable mining property in Nevada, from which he had amassed a large fortune. Jones stated that he wished to get rid of this property to save

himself the trouble of working it, and suggested to Aaris that he should get up a company for purchasing and working it. Aaris received all Jones' statements in good faith, and embodied them in the prospectus of the company, which he succeeded in forming in June, 1865. The affidavit stated that the directors, after allotting the shares, considered it to be their duty to examine into the truth of Mr Jones' statements, and accordingly sent out a deputation to inspect and report upon the property. The directors also stated that they, like Aaris, fully believed at the time that the representations made by Jones were true. Aaris had made an affidavit to the same effect, and the plaintiff had not cross-examined either him or the directors upon their affidavits....

Roxburgh, for the defendants. Under the very wide powers given by the articles of association (to which the plaintiff was, by the prospectus, expressly referred, and of the contents of which he must be held to have notice), the directors had full power to rescind any contract which turned out to be valueless, and make others more beneficial to their shareholders. The statement in the prospectus that the directors "have contracted," did not imply the completed purchase, with the guarantee of an indefeasible title, of this particular property; especially as the articles of association pointed to mining operations generally, without restriction to this particular locality. The directors had acted with perfect good faith, and in full confidence in the representations made to them; and the statement contained in the prospectus was fully justified by the circumstances at the time. Not content, however, to act upon these representations without further inquiry, they had taken the trouble to send a deputation out to Nevada, and at once communicated the result to their shareholders; *Briggs' Case* (L.R. 1 Eq. 483).

SIR W. PAGE WOOD, V.C....Passing over the first statement in the prospectus as to the wealth of the State of Nevada, where the property was situate which the company had contracted for, and as to the large daily returns and the official documents (all which statements may or may not be true), I find statements as to the value of the particular property contracted for, and the large fortune amassed by the proprietor. Were the directors of the company in a position to make these statements, on the faith of which persons have been invited to subscribe the articles of association? All that the directors knew was that Anderson had introduced Jones to Aaris, who signed a contract which embodied the statements contained in the prospectus as to the mine. All this story in the prospectus was an absolute falsehood. Singularly enough the directors, who should have examined into the truth of the prospectus before putting it forward on behalf of the company, suddenly awake to their duties when they have caught their subscribers. They say that they considered it their duty, as directors of the company, to send out a deputation to inspect the property and inquire into its value before proceeding to work it. The deputation send back a report which reads more like a novel than anything in real life. They say that their anticipations regarding the property belonging to Jones have been more than realised as it was found to be almost valueless, but that this was a matter for rejoicing. Why for rejoicing it is difficult to understand! It might have been so if

they could thus have escaped a ruinous contract; but this was not the case, as the contract was not binding upon the company if the company declined to complete it. The directors therefore have put forward statements concerning the contract entered into which were wholly untrue; and which they had no reasonable ground for believing to be true. It was urged on behalf of the defendants that this company was formed not merely to carry out this particular contract, but for the general purposes and objects stated in the memorandum of association. I admit that the plaintiff must be taken to have had full notice of, and be bound by, the contents of the memorandum and articles of association. But the fact that the company had power to work other mines is not sufficient to absolve them from the misrepresentations contained in the prospectus as to this particular property. It is true that the prospectus stated that further information might be obtained at the company's offices; but this was not enough to put persons intending to apply for shares upon inquiry whether statements put forward by the directors were true or false.

*Injunction granted*¹.

[EDITOR'S NOTE. The same principle has been applied to misrepresentations not contained in the prospectus, but made by an agent of the company after its formation. The deceived shareholder was held by the Court of Appeal to be entitled to a rescission of her contract and the return of the money she had paid on allotment; *Hilo Manufacturing Co., Ltd. v. Williamson* (28 T.L.R. 164).]

HORSFALL v. THOMAS.

EXCHEQUER. 1862.

31 L.J.R. Ex. 322.

[*Sale of goods—Concealment of defect.*]

[THE declaration was on a bill of exchange, drawn by the plaintiffs on the defendant, for 233*l.*, at twelve months, after the 2nd of July, 1860, and accepted by the defendant. It was pleaded, *inter alia*, that the defendant was induced to accept the bill by the fraud of the plaintiffs; and also that the consideration for the bill had failed by the defectiveness of the gun for whose price it was a part payment.

¹ [An order was made for winding up the Company, and Mr Smith's name was placed on the list of contributories. He took out a summons to have his name removed; but his application was refused by the Master of the Rolls. The Lords Justices reversed this decision, and ordered his name to be removed. The House of Lords affirmed the order of the Lords Justices (L.R., 4 H.L. 64). Said Lord Cairns, "I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be a rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue." Commenting on these words, Lord Herschell, in *Derry v. Peck* (*supra*) pointed out that they must be limited to cases where "the persons referred to were *conscious*, when making the assertion, that they were ignorant whether it was true or untrue.... When he speaks of not being fraud 'in the more invidious sense,' he refers, I think only to the fact that there was no intention to cheat or injure."]

The plaintiffs were iron-founders, carrying on business at Liverpool; and negotiations had been entered into between them and the defendant, for the construction of a cannon for the purpose of testing some experiments which the defendant was desirous of bringing under the notice of the War Office.

The gun was forged and bored; and it was agreed that the plaintiffs should also rifle the gun, for which they were to receive an additional 95*l.*, which, with 372*l.* the price, amounted to 467*l.* During the boring the defendant went to Liverpool in order to inspect the gun. But it was stated that, the boring apparatus being then in the mouth of the gun and not easily removable, he only saw the outside, and had no opportunity of examining the work. On July 2nd, 1860, the defendant gave two acceptances for 233*l.* 10*s.* each, one at six and the other at twelve months; and the gun was finished and delivered in July, 1860. On July 12th the defendant wrote to the manager that he had seen the gun at Woolwich and was very much pleased with its appearance, and asked for some drawings of the rifling, &c. These were sent in a letter of July 17th, to the plaintiffs' agent in London, communicated by him to the defendant, concluding as follows: "The gun is of the best metal all through, and has no weak points that we are aware of."

The first trials of the gun were successful; and the first acceptance was duly paid. But when, in June, 1861, further trials took place, at the seventh round the gun burst.

It was discovered, after the gun had burst, that the breech end of the chamber was "all soft and spongy," and that a metal plug had been driven into the breech over this soft part. At the trial, before Pollock, C.B., it was stated that scientific evidence would be given to shew that this plug was the cause of the bursting of the gun, and had rendered it practically unsafe. It was argued that, inasmuch as this plug could not have been put in without the knowledge of the plaintiffs, their statement that "the gun was of the best metal all through, and had no weak points that they were aware of," was false and fraudulent, and that the defendant's acceptance having been obtained by this false and fraudulent representation, he was entitled to refuse to meet it. Pollock, C.B., ruled that, the plaintiffs having performed their part of the contract by supplying the defendant with a gun which (on the defendant's own shewing) possessed considerable merit, the fact of its having burst after repeated trials, (even though it should turn out to have burst in consequence of the insertion of the plug, and that the insertion of the plug had been with the plaintiffs' knowledge), was no answer to the action on the bill; and directed a verdict for the plaintiffs.]

Bovill, (in support of a rule calling on the plaintiffs to shew cause why this verdict should not be set aside on the ground of misdirection). The defendant was prepared at the trial with evidence to shew that the gun was unsound to the knowledge of the plaintiffs; and that means had been actively taken to conceal from the defendant the defect causing the unsoundness.

[POLLOCK, C.B. No gun that was ever made could be perfect in all its parts. At all events, he had no right to keep it and pay nothing for it.]

The fragments were worthless.

[POLLOCK, C.B. That cannot be. At all events you must not assume it. There was no evidence that the defendant gave notice to the plaintiffs to take the gun back, or that the contract was to be rescinded in any way.]

It is not denied that the defendant had some use of the gun and some benefit from it. But that ought not to preclude him from setting up as an answer that the acceptance was obtained by fraud.

[WILDE, B. Fraud in the performance of the contract, and fraud in obtaining the bill, are distinct matters.]

The defendant's case is, that the plaintiffs supplied him with an article not manufactured in compliance with the contract; and that, knowing this to be so, they drive in a plug and so deprive the defendant of his power of discovering the fact; and the defendant believing the article to be in accordance with the contract, accepts the bill for the price.

[BRAMWELL, B. The defendant must not only shew that a fraud was practised on him, but that he was induced by that fraud to accept the bill. Now, the defendant had not examined the gun when he accepted the bill; so that putting the plug in had nothing to do with the deception he now complains of.]

That may be. But the plaintiffs, as is shewn by the correspondence, draw the defendant's attention to certain flaws which had appeared during the process of rifling; and knowing of this more serious defect, say nothing about it. That is evidence of fraud.

[MARTIN, B. A partial failure of consideration cannot be shewn as a defence to an action on a bill. The verdict on the bill must be for the whole or nothing.]

In *Byles on Bills*, p. 94, it is said that, where a bill or note is given for goods sold or work done, the price, amount and quality of the goods or work cannot be disputed in an action on the bill. But if fraud can be shewn, it is otherwise as between the parties, for there is then no contract.

* * * * *

BRAMWELL, B....There was in the gun a defect which (for the purposes of the present decision) we may assume was such a defect as to justify the defendant, had he known of it, in rejecting the gun. Further, there had been something done by the makers of the gun which would conceal this defect from any person inspecting the gun. The gun was received by the defendant; it was fired several times; it answered extremely well so long as it continued entire. But, in consequence of those defects, as it was said, it afterwards burst and became worthless. The question before us is, whether there was evidence to go to the jury in support of the plea of fraud. We are of opinion that there was not; and that my Lord was quite right in the view he took of the case. First of all, the matter much relied on was that the plaintiffs or their workmen had done something to conceal this alleged defect in the gun. Had it turned out on investigation that the act so done had been done for a fraudulent purpose, yet the matter had never been under the observation of the defendant in any way; that is to say, he had never seen the gun since the defect had been so concealed as was alleged. It was impossible,

therefore, that this attempt at concealment should have had any operation on his mind or his conduct in any way. If the plug had not been there, his conduct would have been just the same; because, as he did not examine the gun or form any opinion upon the condition of the gun, the condition of the gun was a matter of no consequence....His counsel was compelled therefore to say this, that the plaintiffs having told the defendant that the gun was ready (they knowing that there was in it a defect which would very much impair its value and make it worthless), they were guilty of a fraud in making that statement to the defendant, knowing of the existence of that defect. We are of opinion that that proposition is not maintainable. If it is true in that sense, we are called on, by the argument, to affirm this general proposition—that whenever a man makes a chattel for another and makes it with a defect which... may render it worthless, if the maker of the chattel conceals the knowledge of it from the person for whom it is made, that person not having inspected the chattel so made,...the maker of the chattel is guilty of fraud. No such proposition can be affirmed. The fraud must be committed by the affirmance of something not true within the knowledge of the affirmant; or by the suppression of something which is true and which it was his duty to make known. Here, no doubt, there was no assertion of any untruth; the only question would be, whether there was a suppression of anything which the plaintiffs, the makers, were bound to make known to the defendant....If there be a defect known to the manufacturer, which cannot be seen on inspection, then, indeed, he would be bound to point it out. But if it be a defect which is patent and of which the purchaser is as good a judge as the maker, it is clear to my mind that the maker is not bound to point out the defect to the purchaser. I think it would be a very mischievous thing if it were so because if he was bound to point out the defect he would be bound in safety to point out anything which could be considered a defect. We know the consequence of that. If the maker says, "For prudence sake I point out so and so to you, but I do not think them defects," the purchaser would say, "Here is something wrong, and I must have an abatement made."

...This, it seems, is a patent defect. It is impossible to say that a man can be guilty of a fraud where the person for whom the article is made inspects it....If it would not be a fraud when he has inspected it, then is it a fraud that, having the opportunity of inspecting it, he does not do so? That would be to make the fraud dependent upon his having sense and prudence to examine the article and judge for himself, instead of taking it without looking at it. This consideration seems to me to shew, as a matter of demonstration, that the maker of the article is not guilty of a fraud where, there being a patent defect in it, he simply does not tell the intended buyer of it, but says, "There it is for you, and you can come and look at it if you like," but [the buyer] does not think fit to do so. That was all the fraud relied on in this particular case. We are all clearly of opinion, therefore, that there was no evidence to go to the jury in support of the plea of fraud....

Rule discharged.

THE DEPOSIT AND GENERAL LIFE ASSURANCE COMPANY
REGISTERED v. JOHN AYSCOUGH.

QUEEN'S BENCH. 1856.

6 ELLIS & BLACKBURN, 761.

[*Fraud—Contract voidable—Disaffirmance.*]

COUNT. That "defendant, as and being the holder of 700 shares in the Company, was and is indebted to the said Company in 350*l.*, for certain instalments of capital, then and still due and payable by him to the said Company in respect of the said shares: yet defendant hath not paid the same."

Plea: That "defendant was induced to become the holder of the said shares through the fraud, covin and misrepresentation of the plaintiffs and others in collusion with them." Demurrer. Joinder.

Quain, in support of the plea. The count is founded on the contract of the defendant, made when he became a shareholder. Fraud avoids that contract like all others.

[LORD CAMPBELL, C.J. The defendant, for aught that appears on the record, keeps the shares and takes the benefit from them, and yet refuses to pay calls?]

If he has done any thing to affirm the contract, it will be good matter for a replication; but in pleas of fraud it is not necessary to aver that the contract has been disaffirmed. The fraud may perhaps not be discovered till the moment of the plea, which is itself a disaffirmance.

[CROMPTON, J. This action is not upon the contract; it is given by stat. 7 & 8 Vict. c. 110, s. 55 against the holder of shares; and your plea is not good unless it shews the defendant not to be the holder of the shares. He is holder at least till he disaffirms, though he became so in consequence of fraud.]

In *Newry and Enniskillen Railway v. Coombe* (3 Ex. 565), it was held that infancy was a good plea without any averment that the defendant did not adopt the shares when he came of age....

LORD CAMPBELL, C.J.... The plea is insufficient, inasmuch as it admits that the defendant still is a shareholder. It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded. There is nothing on this record to shew that the defendant has avoided the contract by which he became a shareholder. He had a right, if he pleased, notwithstanding the fraud, to keep the shares and receive the dividends; and he may have intended to do so. The plea therefore should go further, and shew, not only that he was induced to become a shareholder through fraud, but that on discovering the fraud he disaffirmed the transfer of the shares to him. In *Newry and Enniskillen Railway v. Coombe*, the plea was infancy, and that the defendant, whilst an infant, disaffirmed the transfer. It was held that, if the defendant, after coming of age, affirmed the transfer, that would be a matter for a replication, and need not be negatived in the plea. But there the plea shewed the transfer void, unless an affirmative act were done to render it valid; here it shews the transfer valid, unless an act was done to avoid it. I hope that the opinion I expressed in *Burnes v.*

Pennell (2 H.L. Ca., at p. 522) will be found to be correct; and that a shareholder, induced to become such by the frauds of directors; may get freed from his liability¹. But he must cease to be a shareholder.

COLERIDGE, J....The defendant, though he was induced to become a shareholder by fraud, is entitled to the shares and to all benefits arising from them, until he ceases to be the shareholder. His plea does not shew that he has ceased to be the shareholder, or has taken any steps to cease to be so. It is, therefore, no defence to an action for the instalments.

CROMPTON, J....If, in such a case as this, fraud can be made a defence at all, the plea must shew that the defendant had done no acts to make himself a shareholder except those induced by the fraud; and that, as soon as he discovered the fraud, he disaffirmed the transfer to him, and gave up the shares, and that he ceased to be a shareholder.

Judgment for plaintiff.

[EDITOR'S NOTE. See this decision recognised in *Aaron's Reefs v. Twiss*, L.R. [1896] A.C. at p. 278. Cf. *First N.R. Co. v. Greenfield*, L.R. [1921] 2 K.B. 268.]

SECTION IV

UNDUE INFLUENCE

TATE *v.* WILLIAMSON.

CHANCERY. 1866.

L.R. 2 Ch. 55.

[*Setting aside Sale—Fiduciary Relation.*]

THIS was an appeal by Robert Williamson from a decree of Vice-Chancellor Wood (L.R. 1 Eq. 528), setting aside a sale, on the ground that the purchaser stood in a fiduciary relation to the vendor and did not make a full disclosure to him of all material facts within his knowledge relating to the value of the property.

* * * * *

[William Clowes Tate, whilst an infant, inherited from his mother an undivided half of an estate in a coal district. He contracted habits of extravagance at the University; and in consequence of the displeasure occasioned by his debts his father's doors were closed against him. He was thus thrown upon the world at an early age without any one to counsel him; and he became addicted to drinking, and died prematurely at the age of twenty-four. Mr Hugh Henshaw Williamson, his great-uncle by marriage, had been the trustee of the property, and receiver of the rents; which latter duty the defendant, Robert Williamson, was for some time deputed to perform for him. It does not appear that the defendant by this employment acquired any particular information

¹ [EDITOR'S NOTE. Cf. *Smith v. Reese*, *supra*, p. 278, and *Capel v. Sims S.C. Co.* (57 L.J.R. Ch. 713) for the right of a shareholder to repudiate the shares which he has been induced to take by material false representations contained in the prospectus of the company, and which he would not otherwise have taken. To avoid a contract to take shares, Misrepresentation suffices; but, if the contract has been executed and ownership passed, Fraud must be shewn.]

respecting the property, but as he stated in his answer that he had, previously to his first interview with the intestate, "some idea of endeavouring to be the purchaser of the estate, in case the same should come into the market," he was not altogether ignorant of its character and value. The trusteeship came to an end upon Tate's attaining his majority, in July, 1857. Mr Williamson, in surrendering his trust, continued to receive the rents and manage the property. Yet there appears to have been nothing, after his trusteeship expired, which...would have prevented his dealing with Tate upon the same terms as a mere stranger. But with Robert a new relation arose. In 1859, Tate's debts were causing considerable embarrassment; he was unable, in consequence of the quarrel with his father, to apply to him for advice, and turned to Mr H. H. Williamson; to whom he sent a list of the debts due to Oxford creditors, amounting to £1000. The list was given by Mr H. H. Williamson to his nephew, the defendant, whom he requested to see Tate and ascertain upon what terms he could be relieved from his debts. If this could be done for £500 or a little more, he authorised his nephew to advance that amount on further security of the property. The defendant's evidence as to his interview with Tate, on September 5, 1859, was that he offered to negotiate with the creditors for an abatement of their claims, telling Tate that he was authorised by his uncle to advance £500 or more if required. Tate, however, positively refused to allow him to ask for any deduction from his debts, saying that any such application would injure his character; but at the same time stated that he was desirous to sell his share of the estate. This share he agreed on the following day to sell to the defendant for £7000, payable by instalments. The defendant then obtained from a mining engineer, Mr Cope, a valuation of the minerals under the estate, which put them at £20,000 for the two moieties combined. On Sept. 10th, the defendant wrote to Tate, not mentioning this valuation, but pointing out the drawbacks of the property; and also recommending him to consult friends. On Oct. 5th a formal contract of sale, on the terms already mentioned, was executed; and in April, 1860, a conveyance. Tate died of delirium tremens in May. His father, as his heir-at-law and administrator, sued the two Williamsons for a rescission of the conveyance. The bill was dismissed as against H. H. Williamson; but a decree made against Robert. He appealed.]

* * * * *

The *Attorney-General*, for the appellant. The jurisdiction in cases of this nature rests on the principle of correcting the abuse of influence founded on confidence. The jurisdiction, however, does not apply in all cases of confidence, e.g., the confidence which a man may have in a friend. It is difficult to define its extent; but we say that it can be applied only where some relation exists, imposing on the more influential party some special duty, legal or moral, towards the other. The relation must be one which makes it the duty of one party to take care of the other. If such a relation exists, the trusted party must give the other all due protection, and disclose all that he has learnt through the confidential relation. But it is new to say that he is bound to disclose all that he has

learnt at his own expense, and not by virtue of the fiduciary relation. In *Fox v. Mackreth* (2 Bro. C.C. 400), Mackreth, who was a trustee for sale, had obtained information in that character and not communicated it. In *Molony v. Kernan* (2 D. & W. 31), the agent suppressed information obtained in the course of his employment as such. *Rossiter v. Walsh* (4 D. & W. 485) was, in fact, the case of an agent selling to himself. In *Murphy v. O'Shea* (2 J. & L. 422), the agent bought in the name of another person, which was a badge of fraud. There is no case impeaching the position that a person may buy from one towards whom he stands in a fiduciary position, provided the transaction be fair and open, and there be a full disclosure of everything material that has been learnt through the fiduciary position.

But here we contend that, when the contract was entered into, no such fiduciary relation existed as could affect the case. H. H. Williamson had been trustee for the young man, but there was nothing like the relation of guardian and ward. After he came of age the only relation which existed was, that H. H. Williamson, having in him the legal estate of one moiety, received the rents of the whole and paid him a moiety. Robert Williamson only received the rents once or twice at the rent-day dinner, and could not by this means gain any information about the property. There was, then, no fiduciary relation in July, 1859. The coming to advise as to compromising with his creditors, did not create *such* a relation—a relation creating a recognised duty from one towards the other. But suppose a duty undertaken, it was only the duty of advising him as to negotiating for the reduction of his debts; and this came to an end when he positively refused to get them reduced, and determined to sell his estate and pay them himself. But supposing a fiduciary relation to exist, still Robert Williamson was at liberty to buy if he put himself "at arms' length": *Chambers v. Betty* (Beat. 488), and what could he have done more than he did to put himself there? Tate was told to get independent advice. He then employed an independent solicitor, and if he was not properly advised, that was no fault of Robert Williamson's. The letter of the 10th of September is unjustly found fault with. Every statement in it is strictly correct, and a buyer is perfectly at liberty to enlarge upon the disadvantages to which the property is subject. As to Cope's valuation, Robert Williamson never knew of it until the relation of vendor and purchaser had been substituted for the fiduciary relation, if any such ever subsisted. As to value, no doubt the bargain has turned out rather a good one for the purchaser, but not outrageously good. In considering the evidence as to the value of the mines, it must be borne in mind that an undivided share in minerals is very awkward to deal with.

LORD CHELMSFORD, L.C....The jurisdiction exercised by Courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles have been long settled; but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence

which naturally grows out of that confidence is possessed by the other, and this influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

Did, then, the defendant, Robert Williamson, when he put himself in communication with the intestate, clothe himself with a character which brought him within the range of the principle?

[The defendant's counsel say that] the instant Tate refused to allow any attempt to compromise his debts, the defendant's office of adviser came to an end; and from that moment the parties, to use the familiar expression, were dealing "at arms' length." I cannot accept this view of the defendant's position. I think that his visit to London was not solely for compromise, but generally for the arrangement of the intestate's debts—that he came with authority which involved a dealing with the property of the intestate, as he was to advance his uncle's money on the security of this property. And he had his attention particularly directed to the mode of satisfying the debts by a mortgage. He knew, too, that if the payment of the debts in full was insisted upon, and his uncle refused to advance a larger sum than £500, a sufficient amount to discharge all debts could easily be raised upon the security of the property. The defendant had placed himself in a position which rendered it incumbent upon him to give the best advice to the intestate how to relieve himself from his debts. No one can doubt that, if his judgment had been unbiassed, he would have recommended a mortgage and not a sale. But it appears, from the defendant's own statement, that he had a reason for not giving this advice. He had previously thought of purchasing the estate in case it should come into the market for sale; "an event," he says, "he thought was not unlikely to happen."...

Whether the conversation turned so abruptly (from the intestate's refusal to compromise his debts) to the expression of his desire to sell his share of the estate, as represented by the defendant, or not, it is quite clear to my mind that the confidential relation between the parties had not terminated when the negotiation for the purchase of the property by the defendant commenced; and that he did not then, or at any time afterwards, stand in the situation of an ordinary purchaser. This being so, the defendant, pending the agreement, was bound to communicate all the information he acquired, which it was material for the intestate to know in order to enable him to judge of the value of his property. It was admitted that the valuation of Mr Cope was in the hands of the defendant at the time he wrote his letter of the 10th of September. The defendant is charged with making untrue representations in that letter. If he had done so, it would of course strengthen the case against him; but I find nothing in the letter which amounts to a misrepresentation, nor anything more than a disparagement of the property, not uncommon with a purchaser. Having stated my opinion with regard to the duty cast upon the defendant to communicate Cope's valuation to the intestate, it seems unnecessary to pursue the case further.

The fair dealing, in other respects, of the defendant before the agreement was signed, becomes almost irrelevant,...of no consequence, when once it is established that there was a concealment of a material fact, which the defendant was bound to disclose.

Nor, after this, is it of any importance to ascertain the real value of the property. Even if the defendant could shew that the price which he gave was a fair one, this would not alter the case against him....But, in truth, there are strong grounds for thinking that the price agreed to be paid by the defendant is quite inadequate....The value, by the defendant's own shewing, must have been at the least £14,000. For this property the defendant agreed to pay £7000, apparently about half the value; and that not at once, but by instalments....

The defendant had placed himself in such a relation of confidence as prevented him from becoming a purchaser of that property without the fullest communication of all material information which he had obtained as to its value. This openness and fair dealing were the more necessary when he was negotiating with an extravagant and necessitous young man, deprived at the time of all other advice, eager to raise money, and apparently careless in what manner it was obtained. The defendant having, by concealment of a valuation which he had privately obtained, procured a considerable advantage in the price, he cannot be permitted so to turn to his own profit the confidence reposed in him.

Decree affirmed.

DUTTON v. THOMPSON.

COURT OF APPEAL. 1885.

L.R. 23 CH. DIV. 278.

[Voluntary Settlement—Improper Clauses.]

ONE John Thompson, by his will, gave his residuary estate to trustees, of whom the defendant, John Thompson, was one, upon trust after his wife's death to divide the same into nine equal parts, one of which shares he gave to the children of his deceased daughter, Sarah, in equal shares. And he provided that the trustees should have power to withhold the portions bequeathed to the children of Sarah till they respectively attained the age of twenty-five years. The plaintiff, C. E. Dutton, was one of the three children of Sarah; and so became entitled to one twenty-seventh part of the residuary estate. He attained his age of twenty-five years on the 25th of January, 1882.

The defendant, John Thompson, considering that the plaintiff (who was his nephew), was a young man of improvident habits, prepared a voluntary settlement for his execution; after consulting the plaintiff's father and step-mother. This settlement was first tendered to the plaintiff for execution in July, 1879; he then refused to execute it; but subsequently, in July, 1881, he was persuaded by the defendant to do so. The settlement bore date July 2nd, 1881; and the plaintiff thereby assigned all his interest in the residuary estate of the testator to John Thompson and J. W. Thompson upon trust for such persons and for such estate and generally in such manner as the plaintiff should, with the consen-

of the said trustees, by any deed appoint (the granting of such consent to be in the absolute discretion of the said trustees); and, subject to such power of appointment, in trust to pay the income to the plaintiff during his life, and after his death to his children and issue as therein mentioned; and in default of such issue in trust for the plaintiff's stepmother if then living, and if she should be dead, then in trust for the plaintiff's next of kin.

J. W. Thompson did not execute the settlement or accept the trusts. The father and stepmother of the plaintiff disclaimed all interest under the settlement.

In 1882, the plaintiff commenced an action claiming that the settlement should be set aside; on the grounds that his signature to the settlement had been procured by undue influence, that he did not understand the effect of it, and that he had no independent legal advice.

John Thompson, in his defence, stated that the plaintiff was of improvident habits and was in the receipt of weekly wages only, and was not, in the defendant's opinion, likely to be successful in any business or profession; and the defendant was therefore desirous, in furtherance of the expressed wishes of the plaintiff's father and stepmother, that he should make a settlement of the property. The defendant also stated that he had no object in view but the benefit of the plaintiff; and denied that any undue influence had been used, or that the plaintiff did not understand the effect of the deed.

At the trial, the plaintiff swore that before the settlement was tendered to him in 1879 he had heard nothing about it; that he did not know the amount of the property coming to him under the will; that when he signed the deed in 1881 he did not understand the effect of it on his position with respect to the property; that he believed that under his grandfather's will he had no power of drawing the capital, and that he did not know his rights under the will till after he had signed the settlement. The plaintiff had no independent legal advice at the time when he executed the settlement.

On the other hand the defendant swore that the settlement was read over to the plaintiff and explained to him when it was tendered to him in 1879, and also in July 1881, when he executed it.

The Vice-Chancellor of the Duchy of Lancaster, gave judgment to set aside the settlement. The defendant appealed.

Kekewich, Q.C., for the appellant. The settlement is a reasonable one considering the disposition and circumstances of the plaintiff. But, whatever the provisions are, it must be upheld if the plaintiff understood what he was doing when he executed it: *Phillips v. Mullings* (L.R. 7 Ch. 24). The evidence shews that the plaintiff did understand the effect of the settlement. The matter was put fairly before him both in 1879 and in 1881; and it was read over and explained to him on both occasions....

JESSEL, M.R....The deed cannot stand; on the ground that the plaintiff did not understand it. I emphatically disagree with the ground on which some Judges have set aside voluntary settlements, namely, that there were provisions in them which were not proper to be inserted in

such settlements. It is not the province of a Court of justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of justice to set aside a settlement which he chooses to execute, on the ground that it contains clauses which are not proper. No doubt if the settlement were shewn to contain provisions so absurd and improvident that no reasonable person would have consented to them, or if provisions were omitted that no reasonable person would have allowed to be omitted, that is an argument that he did not understand the settlement. But in no other way would it be a reason for setting it aside. In this case I cannot avoid seeing that the defendant acted throughout for what he considered to be for the benefit of the plaintiff. But the question we have before us is not whether the defendant's motives were good or bad, but whether the plaintiff understood the deed. The evidence convinces me that every one thought the plaintiff was very weak minded. I do not mean to say that they thought he was sufficiently so to make him a lunatic, but they thought he had not that full enjoyment of his faculties which average persons have. In the whole transaction they treated him as a baby, and not as a man of average intellect. It is clear that having that opinion the defendant ought to have taken unusual precautions to guard the settlement from any suspicion.

Now when we look at the evidence given by the plaintiff, it is clear from his answers that there was much that he did not understand, and in particular he did not know the amount of the property to be settled. In my opinion there was a special obligation on the part of the defendant to see that the plaintiff understood the settlement, which obligation he has not discharged.

People who prepare settlements for their nephews must shew clearly that their nephews understood them when they executed them. In the case of this settlement I am clearly of opinion that the plaintiff did not understand half of it.

LINDLEY, L.J....The plaintiff did not understand the settlement. It was no doubt read over to him; but it was not fully explained to him. I do not think he knew the amount settled; nor the extent to which he was put under the power of the trustee; nor that the property would eventually go to his stepmother. In my opinion it is impossible that this deed can stand.

Appeal dismissed.

ALLCARD v. SKINNER.

CHANCERY DIVISION. 1887.

L.R. 36 CH. DIV. 145.

[Undue Influence—Laches—Acquiescence.]

[THIS was an action to recover certain sums of money and railway stock alleged to have been made over and transferred by the plaintiff to the defendant Miss Skinner whilst acting under the undue influence of that defendant, and without any independent and separate advice.

In 1868, the defendant was the lady-superior of a sisterhood of ladies who devoted themselves to works of charity, under the spiritual direction of the vicar of St Michael's, Finsbury. In 1868 the plaintiff, who was then about thirty-five years of age, residing with her mother, became an associate of the sisterhood; in 1870 a novice, and in August 1871, she became a professed sister. The plaintiff took vows of poverty, chastity, and obedience. Though the vow of poverty required that a sister should not hold any property, yet neither the vow nor the rules required that the property owned by any sister before she became professed should be made over. The obedience was to be rendered to the superior. "It consists in regarding the voice of your Superior as the voice of God." The rules imposed absolute submission by the sisters to the superior, and prevented a sister from obtaining, without leave, the advice of any person not connected with the sisterhood. After the plaintiff became a sister she from time to time handed over to the defendant the income to which she was entitled under her father's will, and also the capital moneys, as she was entitled to receive them, under that will. They amounted to about £8000, and of this she handed over to the defendant sums exceeding £7000; parts of which were still in the hands of the defendant, but the remainder had been expended for the purposes of the sisterhood before the action was brought.

In May, 1879, the plaintiff left the sisterhood and immediately revoked a will which she had made in favour of Miss Skinner; but made no claim for the return of her property until March, 1885, and did not issue a writ until August, 1885.]

Sir Horace Davey, Q.C., for defendant....The property was made over to the defendant not by way of gift but as trustee for the sisterhood.... There is no case in the books in which, where property has been handed over upon trusts in which the donor and donee and others have a common interest, the Court has ordered it to be returned....In all the reported cases, the undue influence has been exerted for the benefit of the donee.

The plaintiff has failed to shew undue influence. This property was handed over pursuant to obligations she took upon herself when she first joined the sisterhood...; when, after consulting her relatives, she with perfect freedom took...the fixed intention of devoting herself and her property to this charity.

But if the gifts were revocable, they cannot be revoked now, years after the money has been spent, with the plaintiff's approval, in establishing the charity. She is barred by laches and acquiescence. Time began to run against her in 1879. She was then quite independent of any spiritual control...and must be taken to have known her rights and to have elected to abide by the gifts she had made.

[Kekewich, J., gave judgment for the defendant. The plaintiff appealed. The arguments of counsel on the appeal are not given in the Law Reports.]

COTTON, L.J....It is urged by counsel that there is no difference between the claim of the plaintiff to the stock remaining and her claim to the moneys given by her to the defendant and applied by her to the purposes of the sisterhood. If the money so expended had been applied

by the transferee for her own selfish purposes, or had been obtained by fraud or deception, probably this would have been the case. But if the plaintiff has an equity to set aside gifts made to the defendant, in my opinion the defendant would have a stronger equity against the plaintiff to prevent her from making the defendant personally liable for money spent for the charitable purposes which the plaintiff was at the time willing and anxious to promote.

Is the plaintiff entitled to recall the stock still in hand? There is no decision in point with reference to a case like the present. For, although in the case of *Whyte v. Meade* (2 Ir. Eq. Rep. 420), a deed of gift by a nun was set aside, there were in that case special circumstances which prevent it being treated as an authority in favour of the plaintiff. The question is—Does the case fall within the principles laid down by the Court of Chancery in setting aside voluntary gifts, executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes. First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose. Second, where the relations between the donor and donee have, at or shortly before the execution of the gift, been such as to raise a presumption that the donee had influence over the donor; in such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor, acting under circumstances which enabled him to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of will. The first class of cases depend on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, to prevent the relations which existed between the parties and the influence arising therefrom being abused¹.

It cannot be contended that this case comes under the first class of decisions to which I have referred. The question is whether the case comes within the principle of the second class; and I am of opinion that it does. At the time of the gift the plaintiff was a professed sister, and, as such, bound to render absolute submission to the defendant as superior of the sisterhood. She had no power to obtain independent advice, she was in such a position that she could not freely exercise her own will as to the disposal of her property, and she must be considered as being not, in the largest and amplest sense of the term—not in mind as well as person—an entirely free agent....

¹ [EDITOR'S NOTE. The student should read the very interesting case of *Morley v. Loughnan* (L.R. [1893] 1 Ch. 736); in which, as an instance of the first class above mentioned, large gifts were set aside because obtained by "personal influence, established for the purpose, under a cover of religious brotherhood." The further question remained undecided, whether the gifts, even had they been made quite freely, might not have been set aside on grounds of public policy as an instance of the second class.]

But Mr Justice Kekewich decided against the plaintiff on the ground, that she had competent advice, that of her brother, before she joined the sisterhood; and that she then formed the resolution to give everything to the sisterhood; and that this prevents the subsequent transfer being set aside. In my opinion, even if there were evidence that she had, before she joined the sisterhood, advice on the question of how she should deal with her property, that would not be sufficient. The question is, whether at the time when she executed the transfer she was under such influences as to prevent the gift being considered as that of one free to determine what should be done with her property....The title of the defendant depends solely on the transfer made in 1874. In my opinion, when the plaintiff left the sisterhood in 1879, she was entitled to have re-transferred to her the fund still held by the defendant. Has she lost this right by delay?

This case is not like that of a contract voidable by fraud. There the party defrauded must elect; and within a reasonable time, for till he does so he retains the right or the benefits, however inadequate, secured to him by the contract. It is to such a case that the judgment of the Court in *Clough v. L.N.W. Ry. Co.* (L.R. 7 Ex. 26) applies; and not to a case of voluntary gift like the present, where the person seeking to set aside the transfer never received any benefit whatever from the transaction.

...Mere delay in enforcing a right is not itself a defence. It is very different from raising no objection to an act while it is being done, which may be treated as assent to the act, and therefore as being acquiesced in in such a sense as to be an equitable defence....Moreover, delay in asserting rights cannot be in equity a defence unless the plaintiff were aware of her rights. I think that we ought to hold that she did not till long after 1879 know her rights. The delay which has occurred since 1879 is, I think, a defence against any claim to the dividends before the commencement of the action. But in my opinion it is no evidence as regards the stock remaining in the hands of the defendant and the dividends accrued since the commencement of the action. The delay in this case does not, in my opinion, amount to evidence that the plaintiff recognised the gift as her own spontaneous act....

LINDLEY, L.J....The plaintiff's gifts were made under a pressure which, while it lasted, she could not resist; and were not past recall when that pressure was removed....She was entitled to invoke the aid of the Court to obtain restitution.

Is it too late for her to invoke that assistance? More than six years elapsed between the time when the plaintiff left the sisterhood and the commencement of the present action....The question is, whether the defence of laches and acquiescence ought to prevail. In my opinion it ought....The case, however, by no means rests on mere lapse of time. There is conduct amounting to confirmation of her gift. Gifts liable to be set aside on the ground of undue influence have always been treated as voidable and not void....Further, I cannot come to the conclusion that nothing has been done [by the sisterhood] on the faith of the money being the property of the sisterhood. It would not be fair to the defendant to compel her now to restore the money....

BOWEN, L.J....In the present instance there was no duress, no incompetency, no want of mental power on the part of the donor. Passing to the duties of the donee, it is plain that equity will not allow a person who exercises a dominant religious influence over another to benefit, directly or indirectly, by the gifts which the donor makes under or in consequence of such influence; unless it is shewn that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside....The plaintiff had vowed in the most sacred and solemn way absolute and implicit obedience to the will of the defendant, her superior, and she was bound altogether to neglect the advice of externs—not to consult those outside the convent....The plaintiff, so long as she was fettered by this view—so long as she was under the dominant influence of this religious feeling—was a person entitled to the protection of the rule....

Mr Justice Kekewich seems to have thought that the question turned on the original intention of the donor at the time she entered the convent; and that what passed subsequently could be treated as if it were a mere mechanical performance of a complete mental intention originally formed....Her original intention is one of the circumstances, no doubt, which bear upon the case. But it is not the crucial fact. We ought to look at the time at which the gift was made, and to examine what was then the condition of the donor who made it. For these reasons I think that we can hold but one opinion—that in 1879 the plaintiff could have set this gift aside.

Then comes the question of the time which has elapsed since....If her delay has been so long as reasonably to induce the recipient to think, and to act upon the belief, that the gift is to lie where it has been laid, then, by estoppel, the donor of the gift would be prevented from revoking it. But I do not base my decision here upon the ground of estoppel. During five years she has had the opportunity of reflecting upon what she has done. She was surrounded by persons perfectly competent to give her proper advice. I draw unhesitatingly the inference that she did, in or shortly after 1879, consider this matter and determine not to interfere with her previous disposition. Was she aware of her rights at the time she formed this resolution? I think that she must have been, having regard to the character of the advisers who surrounded her; but it is enough if she was aware that she might have rights, and deliberately determined not to act upon them.

This appeal ought to be dismissed on the ground that the time which has elapsed, (though not a bar in itself, though not accurately to be described as mere laches which disentitles the plaintiff to relief), is nevertheless, coupled with the other facts of the case, a matter from which but one reasonable inference ought to be drawn—namely, that the lady considered her position at the time, and elected not to disturb the gift which she then at that moment felt that (if she had the will) she had the power to disturb.

Appeal dismissed.

CHAPTER VI

UNLAWFUL AGREEMENTS

FETHERSTON *v.* HUTCHINSON.

KING'S BENCH. 1590.

CROKE ELIZ. 199.

[Consideration in part illegal.]

ASSUMPSIT, and declares, That whereas the plaintiff had taken the body of one H. in execution at the suit of J. S. by virtue of a warrant directed to him as special bailiff, the defendant, in consideration he would permit him to go at large, and of two shillings to the defendant paid, promised to pay the plaintiff all the money in which H. was condemned. And upon Assumpsit it was found for the plaintiff. It was moved in arrest of judgment, that the consideration is not good, being contrary to the Statute of 23 H. 6¹, and that a Promise and Obligation was all one. And, though it be joyned with another consideration of two shillings, yet being void and against the Statute for part, it is void in all.

COLLINS *v.* BLANTERN.

COMMON PLEAS. 1767.

2 WILSON, 341.

[THE action was brought upon a bond for £700, given by Blantern and four other persons to secure the payment of £350 to the plaintiff on May 6th, 1765. The defendant pleaded that two of the five obligors, viz. John and Thomas Walker, and three others, stood indicted by John Rudge, on five indictments, for wilful and corrupt perjury, and had severally pleaded Not Guilty before the making of the bond. And on the same day the bond was made the several indictments, at the time of making the unlawful agreement after mentioned and the note, were about to come on to be tried at Stafford. Whereupon it was corruptly agreed between Rudge the prosecutor and the plaintiff and the five persons indicted, that the plaintiff should give Rudge his note for 350*l.*, in consideration for not appearing to give evidence at the trial; and that the five obligors should execute the bond as an indemnity to the plaintiff for giving such note. The plaintiff accordingly gave to Rudge the note for 350*l.*, and the obligors executed the bond.

Joinders in demurrer.]

For the plaintiff it was insisted that the condition of the bond being singly for the payment of a sum of money, the bond is good and lawful;

¹ [EDITOR'S NOTE. By 23 Hen. 6, c. 10, bailiffs are forbidden to take any reward "for omitting of any arrest of any person...by them, by colour of their office, arrested, or for shewing any ease or favour to any such person for reward or profit"; under penalty of £40 and treble damages.]

and that no averment shall be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it....

WILMOT, L.C.J....It hath been insisted for the plaintiff that he was not privy to the bargain; so there appears to be nothing illegal done by him. But we are all clearly of opinion, that the whole of the transaction is to be considered as one entire agreement. For the bond and note are both dated upon the same day, for payment of the same sum of money on the same day. The manner of the transaction was to gild over and conceal the truth; and wherever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and shew the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth. Many felonies are not so enormous offences as perjury; and therefore to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void; what right then hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful.

We are all of opinion that the bond is void *ab initio*, by the common law, by the civil law, moral law, and all laws whatever....Vinnius, in his commentary, carries it so far as to say, you shall not stipulate or promise to pay money to a man not to do a crime, "*cum hoc ipsum flagitiosum est pecuniam pacisci quo flagitio abstineas*," Dig. lib. 1, tit. 5. This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good....Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again.

It is objected against the defendant that he has no remedy at law but must go and seek it in a court of equity. I answer, we are upon a mere point of common law, which must have been a question of law long before courts of equity exercised that jurisdiction which we now see them exercise; (a jurisdiction which never would have swelled to the enormous bulk we now see, if the judges of the courts of common law had been anciently as liberal as they have been in later times). To send the defendant in this case into a court of equity, is to say there never was any remedy at law against such a wicked contract as this is. Formerly there was too confined a way of thinking in the judges of the common law courts; and courts of equity have risen by the judges not properly applying the principles of the common law, being too narrowly governed by old cases and maxims. It is objected as a maxim that the law will not endure a fact *in pais de hors* a specialty to be averred against it; and that a deed cannot be defeated by anything less than a deed, and a record by a record; and that if there be no consideration for a bond it is a gift. I answer, that the present condition is for the payment of a sum of money but that payment (to be made) was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes

at the contract itself in such a manner as shews that, in truth, the bond never had any legal entity. And if it never had any being at all, then the maxim that a deed must be defeated by a deed of equal strength does not apply to this case. The law will legitimate the shewing it void *ab initio*; and this can only be done by pleading....If this wicked contract be not pleadable, it will be good at law, and have the same legal operation as a good and an honest contract; which seems to be most unreasonable. What strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say, You shall not be permitted to plead the facts which clearly shew it to be wicked and void!...As to a bond being a gift, that is to be repelled by shewing it was given upon a bad consideration; you may thereby repel the presumption of donation. It has been objected, that the admission of such plea as the present will strike at securities by deed; the answer is, that such a plea in the case of *infancy, gaming, duress, &c., &c.*, is admissible.... I want no case to warrant my opinion, it is enough for me if there be no case against me, and I think there is not. In 1 Hen. 7, 14, 16*b*, Brian, then Chief Justice, says, "I do not see in any case in the world how a man can avoid a specialty by a bare matter of fact concerning the same deed, *if so be that the deed was good at the commencement*"; but the present deed was never good.... We are all of opinion that judgment may be for the defendant; that the averment pleaded is not contradictory, but explanatory, of the condition; that the bond was void *ab initio* and never had any existence.

Judgment for defendant.

HOLMAN v. JOHNSON.

KING'S BENCH. 1775.

COWPER, 341.

[*Sale of goods—Remote unlawful object.*]

ASSUMPSIT for goods sold and delivered: Plea non-assumpsit: verdict for the plaintiff. The plaintiff who was a resident at Dunkirk, together with his partner, a native of that place, sold and delivered a quantity of tea (for the price of which the action was brought) to the order of the defendant, knowing it was intended to be smuggled by him into England. They had, however, no concern in the smuggling scheme itself, but merely sold this tea to him, as they would have done to any other person in the ordinary course of their trade. Motion for a new trial.

Mansfield, for defendant. The contract for the sale of this tea being founded upon an intention to make an illicit use of it, which intention was with the privity and knowledge of the plaintiff, he was not entitled to the assistance of the laws of this country to recover the value of it. *Robinson v. Bland* (Burr. 1077; 1 Bl. 234, 256) shews that the contract must be judged of by the laws of this country, and consequently that an action for the price of the tea could not be supported here....

LORD MANSFIELD. There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says that in a variety of circumstances, with regard to contracts legally

made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For no country ever takes notice of the revenue laws of another¹.

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, by accident (if I may so say). The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior est conditio defendentis*.

The question therefore is, Whether, in this case, the plaintiff's demand is founded upon the ground of any immoral act or contract, or of his being guilty of any thing which is prohibited by a positive law of this country. An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris*. What then is the contract of the plaintiff? It is this: being an inhabitant of Dunkirk, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at Dunkirk to the defendant's order; to be paid for in ready money there, or by bills drawn personally upon him in England. This is an action brought merely for goods sold and delivered at Dunkirk. Where then, or in what respect is the plaintiff guilty of any crime? Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is no bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete, by the delivery of the goods at Dunkirk.

To what a dangerous extent would this go if it were to be held a crime. If contraband cloths are bought in France, and brought home hither; or if glass bought abroad, which ought to pay a great duty, is

¹ [EDITOR'S NOTE. But Prof. Dicey (*Conflict of Laws*, 2nd ed., p. 35 n.; c. pp. 553-555), speaking of "the anomalous refusal of English courts to treat as invalid a contract made in violation of a foreign revenue law," says that it is questionable whether our courts would *now* uphold it. He adds that they certainly would not apply it to the revenue-laws of any country forming part of the British dominions.]

run into England; shall the French tailor or the glass-manufacture stand to the risk or loss attending their being run into England? Certainly not. Debt follows the person, and may be recovered in England, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore, I am clearly of opinion, that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any act of parliament....

The gist of the whole turns upon this; that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent into England at a certain price; and the plaintiff had undertaken to send it into England, or had had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of England.

New trial refused.

PEARCE AND ANOTHER v. BROOKS.

EXCHEQUER. 1866.

L.R. 1 Ex. 213.

[Contract—Void for immorality.]

DECLARATION stating an agreement by which the plaintiffs agreed to supply the defendant with a new miniature brougham on hire, till the purchase money should be paid by instalments in a period which was not to exceed twelve months; the defendant to have the option to purchase as aforesaid, and to pay 50*l.* down; and in case the brougham should be returned before a second instalment was paid, a forfeiture of fifteen guineas was to be paid in addition to the 50*l.*, and also any damage, except fair wear. Averment, that the defendant returned the brougham before a second instalment was paid, and that it was damaged. Breach, non-payment of fifteen guineas, or the amount of the damage.

Plea 3, to the first count, that at the time of making the supposed agreement, the defendant was to the knowledge of the plaintiffs a prostitute, and that the supposed agreement was made for the supply of a brougham to...assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. Issue.

The plaintiffs were coach-builders in partnership, and evidence was given which satisfied the jury that one of the partners knew that the defendant was a prostitute; but there was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution; and there was no evidence that the plaintiff expected to be paid out of the wages of prostitution. Bramwell, B., ruled that the allegation in the plea as to the mode of payment was immaterial. He put to the jury the following questions: 1. Did the defendant hire the brougham

for the purpose of her prostitution? 2. If she did, did the plaintiffs know the purpose for which it was hired? The jury found that the carriage was used by the defendant as part of her display, to attract men; and the plaintiffs knew it was supplied to be used for that purpose. They gave nothing for the alleged damage. Verdict for the defendant.

Chambers, Q.C., moved to enter a verdict for the plaintiffs for the fifteen guineas penalty. There was no evidence that the plaintiffs knew the purpose for which the brougham was to be used.

[BRAMWELL, B....The jury were entitled to bring their knowledge of the world to bear upon the facts proved. The inference that a prostitute (who swore that she could not read writing) required an ornamental brougham for the purposes of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients. And the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose.]

But it is impossible to say that there was any express purpose of prostitution; the defendant might have used the brougham for any purpose she chose, as to take drives, to go to the theatre, or to shop. Even if there were evidence, the jury have not found the purpose with sufficient distinctness.

Secondly, the last allegation in the plea is material, the plaintiffs must intend to be paid out of the proceeds of the immoral act. The words of Lord Ellenborough in *Bowry v. Bennett* (1 Camp. 348) are very plain, the plaintiff must "expect to be paid from the profits of the defendant's prostitution."

[BRAMWELL, B. The purpose of the seller in selling is, that he may obtain the profit, not that the buyer shall put the thing sold to any particular use; it is for the buyer to determine how he shall use it. Suppose, however, a person were to buy a pistol, saying to the seller that he means with it to shoot a man and rob him, is the act of the seller illegal, or is it further necessary that he should stipulate to be paid out of the proceeds of the robbery? If the looking to the proceeds is necessary to make the transaction illegal, is it not also necessary that it should be part of the contract that he shall be so paid?]

Suppose a cab be called by a prostitute, and the driver directed to take her to some known place of ill-fame, could it be said that he could not claim payment?

[BRAMWELL, B. If he could, this absurdity would follow, that if a man and a prostitute engage a cab for that purpose, and if, to meet your argument, the driver reckoned on payment, as to the woman, out of the proceeds of her prostitution, the woman would not be liable, but the man would, although they engaged in the same transaction and for the same purpose.]

If the contract is void for this reason, the plaintiffs were entitled to resume possession, and to bring trover for the carriage; a test, therefore, of the question will be, whether in such an action, if the jury found the same verdict as they have found here, on the same evidence, the plaintiffs would be entitled to recover.

[MARTIN, B. I think they would; and that if the carriage had not been returned in this case, the plaintiffs would be entitled to determine the contract on the ground of want of reciprocity, and to claim the return of the article.]

POLLOCK, C.B....It is settled law, that any person who contributes to the performance of an illegal act, by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied¹. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*. Whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other....If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain.

PIGOTT, B....It cannot be necessary that the plaintiffs should look to the proceeds of the immoral act for payment; the law would indeed be blind if it supported a contract where the parties were silent as to the mode of payment, and refused to support a similar contract in the rare case where the parties were imprudent enough to express it.

BRAMWELL, B....There is no doubt that the woman was a prostitute; no doubt to my mind that the plaintiffs knew it; there was cogent evidence of the fact, and the jury have so found. The only fact really in dispute is for what purpose was the brougham hired, and if for an immoral purpose, did the plaintiffs know it?...I think the jury were entitled to infer, as they did, that it was hired for the purpose of display, that is, for the purpose of enabling the defendant to pursue her calling, and that the plaintiffs knew it.

That being made out, my difficulty was, whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense, it was not for the same purpose. If a man were to ask for duelling pistols, and to say: "I think I shall fight a duel to-morrow," might not the seller answer: "I do not want to know your purpose; I have nothing to do with it; that is your business: mine is to sell the pistols, and I look only to the profit of trade." No doubt the act would be immoral, but I have felt a doubt whether it would be illegal. The authority of *Cannan v. Bryce* (3 B. & A. 179) and *M'Kinnell v. Robinson* (3 M. & W. 434) concludes the matter.

¹ [EDITOR'S NOTE. In *Re Mahmoud* (L.R. [1921] 2 K.B. 717), Bankes, L.J., said "Where there is a contract for the sale of goods which may be used either for a lawful or for an unlawful purpose, and the vendor knows at the time of sale that they are going to be used for the unlawful purpose, the rule is the same as that where the contract is *ab initio* unlawful. An illustration is *Langton v. Hughes* (1 M. & S. 593). There a chemist sold drugs to a brewer, knowing that they were going to be used by the brewer in making beer; which was prohibited by statute."]

In the latter case, Lord Abinger says (p. 441): "As the plea states that the money for which the action is brought was lent for the purpose of illegally playing and gaming therewith, this money cannot be recovered back; on the principle (fully settled in the case of *Cannan v. Bryce*) that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced." This Court then decided that it need not be part of the bargain that the subject of the contract should be used unlawfully; but that it is enough if it is handed over for the purpose that the borrower shall so apply it.

POLLOCK, C.B....If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied. But if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose, and afterwards it was turned to that use, neither *Cannan v. Bryce*, nor any other case, decides that his act would be illegal.

Rule discharged.

[EDITOR'S NOTE. If there be a taint of immorality, the degree of it is immaterial. Hence in *Upfill v. Wright* (L.R. [1911] 1 K.B. 506) the rule in *Pearce v. Brooks* was applied where premises had been let to a woman in order that she might there receive the visits of the *one* man whose mistress she was, and who would supply her with money for the rent.]

SCOTT v. BROWN & OTHERS

QUEEN'S BENCH. 1892.

L.R. [1892] 2 Q.B. 724.

[*Purchase of shares—"Market-Rigging."*]

[THESE consolidated actions were tried before Wright, J., and a special jury.]

Messrs Brown, Doering & McNab, the defendants in both actions, were members of the London Stock Exchange, carrying on business in partnership together; and they were brokers to a company called the Steam Loop Company, Limited. That company had issued a prospectus inviting subscriptions for its share capital; and the defendants had previously to such issue underwritten a part of the share capital of the company and were holders of a considerable number of its shares. Mr Dugald Scott, the plaintiff in the first action, was a promoter of the company and interested in it. Messrs Slaughter & May, the plaintiffs in the second action, were the solicitors of the company, and also the solicitors of Mr Scott. Mr Gillespie was one of the principal promoters of the company. The plaintiffs in both actions had instructed the defendants, Messrs Brown, Doering & McNab, to purchase shares for them respectively, in the company; and had duly paid for such shares. The plaintiffs in both actions sought to recover the price paid for such shares from the defendants; on the ground, among others, that instead of purchasing shares for them in the ordinary way, the defendants had transferred to the plaintiffs the defendants' own shares.

The plaintiffs in both actions relied upon a contract contained in certain letters and telegrams passing between the plaintiffs and the defendants. On December 6th, 1890, the following telegrams passed: McNab to Scott—"Must have positive order from you to buy at least 500 Loop shares in market on Monday, to start market on. Gillespie and Jack doing this on understanding that you do so. This necessary to insure public application and to start market. Reply." McNab to Scott—"You must agree, otherwise I drop the whole thing, as without it advertisements wasted and no public application; also no market in shares." Scott to Slaughter—"McNab wires me I must give him positive order buy 500 Loop shares in market on Monday start market. Gillespie and Jack doing same condition I do. Wired no. McNab replies must, otherwise he will drop whole business." Slaughter to Scott—"Have agreed with McNab that the £500 Gillespie owed us may be applied market purposes. Think additional support needed." On the same day McNab wrote to Scott a letter as follows: "As I wired you to-day, it is an absolute necessity that somebody sends orders to buy Steam Loop in the market, otherwise who is going to start the market?...You ought to go at least 500. Unless we can get a quotation into the papers, saying the shares are at a premium, on Monday, we will never get the public on. This we can manage with practically no risk to ourselves if we combine and absolutely buy the shares. If we do not do it, the money spent on advertisements is simply thrown away....It is an absolute necessity that it has to be done. You have only to ask any one about new companies if it is not a necessity."

On Dec. 7th, Scott wrote to Slaughter: "I am quite agreeable that the £500 lent Gillespie shall be used to make a market."

On December 9th, 1890, Brown, Doering & Co. wrote to Slaughter, "We enclose contract for purchase of 429 Loop shares at 6s. 7d. premium. We have forwarded to the *Financial News* the contract note for shares bought to-day on your behalf—150 shares at 8s. 4½d. premium—to get the quotation."

Wright, J., held that there was no evidence upon which the jury could reasonably find that the defendants' firm, Brown, Doering & Co., had transferred to the plaintiff their own shares; and he directed the jury that there must be a verdict for the defendants. The defendants had not raised the defence of illegality.]

The plaintiffs in both cases made application for a new trial.

LINDLEY, L.J....No Court ought to allow itself to be made the instrument of enforcing obligations alleged to arise out of a transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not¹. If the evidence adduced by the plaintiff

¹ [EDITOR'S NOTE. "The court is bound, once it knows that a contract is illegal, to take the objection and to refuse to enforce the contract; whether its knowledge comes from the statement of the party who was guilty of the illegality or comes from outside sources. There is no question of Estoppel; it is for the protection of the public that the court refuses to enforce such a contract" (*Per Scrutton, L.J. (L.R. [1921] 2 K.B. at p. 729)*).

proves the illegality the Court ought not to assist him. The correspondence put in evidence by the plaintiff shews conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true. But it is also true that the sole object of the purchase was to cheat and mislead the public. His illegal contract confers no rights on him: see *Pearce v. Brooks* (*supra*, p. 303). I am aware that what the plaintiff has done is commonly done; it is done every day. But this is immaterial. Picking pockets and various forms of cheating are common enough, and are nevertheless illegal....

A. L. SMITH, L.J....It is said for the plaintiff that there was nothing deceitful or fraudulent in the fact of his paying his 632*l.* 3*s.* 5*d.* to McNab to purchase shares with upon the open market. If that had been all, I agree. But the question is, Was the payment made for the sole purpose of creating therewith a fictitious premium, in order to induce the public to purchase shares in the company, and thereby benefit the plaintiff and McNab at the expense of the buyer—a deceitful and fraudulent means whereby to cheat and defraud those who might buy shares in the company? I am of opinion that it was. Test it in this way. Suppose a purchaser induced to purchase shares of the plaintiff or McNab by means of the fictitious premium, created by them solely for the purpose of inducing such purchaser and others to buy, could he or not have successfully sued either or both for a false and fraudulent misrepresentation? He could. The agreement to do an illegal act by illegal means is proved; and both the plaintiff and McNab were liable to be indicted for conspiring to cheat and defraud. When the plaintiff's statement of claim is looked at it will be seen that he there states the purposes for which he handed the money to the defendants—viz. to “keep up the price of the shares,” which, upon the evidence, was shewn to be “to create a fictitious premium.”...

The maxim “*In pari delicto potior est conditio possidentis*” applies, and this Court ought not to assist the plaintiff to recover the 632*l.* 3*s.* 5*d.* back from the defendants.

Appeal dismissed.

BARCLAY v. PEARSON.

CHANCERY. 1893.

L.R. [1893] 2 CH. 154.

[*Gaming*—“*Missing Word*” *Competition*.]

[THIS action arose out of a competition carried on by the proprietor of *Pearson's Weekly*.

The terms of that competition were thus stated in *Pearson's Weekly*:

“Missing-word Competition No. 53.

On page 331 is a paragraph about an experiment with camphor. The last word in it is omitted. Readers who wish to enter this competition

must cut out the coupon below, fill in this word, and send it with a postal order for one shilling, to reach us on December 12.

The correct word is in the hands of Mr H. S. Linley, chartered accountant, 124, Chancery-lane, enclosed in an envelope sealed with our seal. His statement with regard to it will appear with the result of the competition in the week after next. The whole of the money received in entrance fees will be divided amongst those competitors who fill in the word correctly."

The paragraph was: "Here is a little experiment which is well worth shewing. Procure a bit of ordinary camphor and from it break off tiny pieces. Drop these upon the surface of some pure water contained in any kind of vessel and they will immediately begin to rotate and move about, sometimes continuing to do this for several hours,...in a manner that is extremely —."

The subscriptions of the 472,574 competitors, at 1s. apiece, amounted to no less than £23,628. 14s., and the result as published in the defendant's paper was that 1358 persons were declared to be winners of £17. 8s. each. Before the money could be distributed, however, a competition of a similar nature, in the *Pick-me-up* periodical, had been held by a London police magistrate, Sir John Bridge, to be illegal. Thereupon this action was brought by one of the 1358 successful competitors on behalf of himself and all the others, and by it he asked—for administration of the trusts of the money; for distribution of the money among the persons entitled thereto; and for a receiver of the money, or to have it brought into court.

When the case came on, the money was ordered to be paid into court; and a special case to be stated for the opinion of the Court.

* * * * *

Buckley, Q.C., for plaintiffs. This was not a lottery, because the essential element of Chance was eliminated; the missing word having been agreed on before the commencement of the competition. In the case before Sir John Bridge, Chance came in; the missing word being drawn by lot at the conclusion of the competition. Nor was this a wager. A wager is the staking of money on an event uncertain. To constitute a wager there must be a loser; but Pearson could lose nothing, and every competitor might be a winner. Nor could it be a wager by each competitor with every other competitor. Even if a wager, it is only void; and is not illegal. Pearson has declared himself a trustee of the fund; and ought to execute the trust in favour of the winners.]

STIRLING, J....Under Order XXXIV, I am at liberty "to draw from the facts and documents stated in the case any inference, whether of fact or law, which might have been drawn therefrom if proved at the trial"; and I draw the following inferences: (1) It is of the essence of the competition that there should be several words which might more or less appropriately fill the gap in the paragraph. A great number of words might, with perfect grammatical and logical propriety, be selected for the purpose. (2) It is not of the essence of the competition that the word to which success attaches should be the most appropriate to fill

the gap. In the present case many words appear to me more appropriate than "unaccountable." (3) No clue is given to the mode in which, among the many words more or less appropriate, that to which success attaches is actually chosen. I infer that the selection is perfectly arbitrary, or, in other words, that it is made by chance; and is none the less so because the range of selection, though wide, is not unlimited. It appears to me (and it was not disputed in argument) that if this competition constitutes a lottery within the meaning of 42 Geo. III, c. 119, it was illegal.

It is, therefore, to be considered, in the first place, whether it was a lottery. In *Taylor v. Smetten* (11 Q.B.D. 207), Hawkins, J., says: "In Webster's Dictionary a lottery is defined to be a distribution of prizes by lot or chance; and in such sense we think the word is used in the statute." I entirely agree. In the present case the competition is intended to end in a distribution of prizes—viz., shares in the fund contributed by all the competitors; I think that the distribution takes place "by chance." Sir John Bridge had to consider the case of a competition conducted generally on a similar mode to that now in question, but with the following variations of detail: The word to which success attached was not fixed until after all the coupons had been sent in; and was then chosen by selecting from a bag one of 20 or 30 pieces of paper on which had been written words which were more or less appropriate solutions. The magistrate held that it was a scheme for distributing prizes by chance, and consequently a lottery. In giving judgment he is stated to have said (according to the report with which I have been furnished): "If the competition is decided by skill and judgment and not by chance then it is not a lottery....If competitors are asked to supply the most appropriate word, it makes a difference. The defendants do not pretend to say that they call for the selection of the most fitting word. The selection of the word must be entirely a matter of chance. On that ground the case comes within the meaning of the Lottery Acts." I think these observations applicable to the present case. Neither the circumstance that the word is determined before the competition begins, nor the circumstance that the mode of selection is unknown, appears to me to give rise to any real difference. It was urged that the chance or lot contemplated by the statute 42 Geo. III, c. 119, must be *ejusdem generis* with those enumerated—viz., "dice, lots, cards, balls" or "numbers or figures." I think the use of a physical lot is form not substance; the arbitrary, unfettered choice of the editor of *Pearson's Weekly* does not substantially differ from selection by means of the bag made use of in the competition which gave rise to the decision at Bow-street, and was admitted to fall within the term of the Act. In my opinion, therefore, the competition was illegal under the statutes against lotteries.

This would dispose of the case were it not that the fund has been paid into Court, and it becomes necessary to consider what are the rights of the unsuccessful competitors. The law on this has been recently considered in the case of *Kearley v. Thomson* (*infra*, p. 317)....Among the cases under the Lottery Acts is *Browning v. Morris* (2 Cowper, 790), which was decided in 1778. That was an action in which the plaintiff and the defendant were both lottery officekeepers, and it was brought by one

against the other in order to recover money paid upon an illegal transaction or contract. Then Mansfield, L.C.J., said: "The rule is 'in *pari delicto potior est conditio defendentis*.' Where the contract is executed, and the money paid *in pari delicto*, this rule certainly holds; and the party who has paid it cannot recover it back. For instance, in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action, because both plaintiff and defendant are equally criminal. But where transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men (the one from their situation and condition being liable to be oppressed or imposed upon by the other), there the parties are not *in pari delicto*; and, in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." These words "after the transaction is finished and completed" are very important. Then he refers to the statute 5 Geo II, c. 24, s. 27, to prevent bad practices upon bankrupts. That statute, he says, "prohibits taking any money or security from the bankrupt as the consideration for signing his certificate. Suppose a creditor refuses unless a bankrupt consents to give him a sum of money. The bankrupt gets the money from a friend or relation, and the creditor, in consequence, signs the certificate. The bankrupt renews his trade, and receives every advantage he can desire from getting his certificate. He may, notwithstanding, bring his action and recover the money back. And this though he has acted contrary to a law made for his own benefit." In *Browning v. Morris* it was held that the money paid to the plaintiff could not be recovered back. But it must be borne in mind that the plaintiff was also a lotterykeeper, and was *in pari delicto* with the defendant. I think that that case is an authority for holding in the present case that, in the absence of special circumstances, each unsuccessful competitor is entitled (notwithstanding that the competition is finished and the prize-winners ascertained) to bring an action at law for the recovery of what was paid by him to the defendant Pearson; and would be so entitled even if the fund had been distributed. The cases shew that, notwithstanding the illegality of a contract, an action may be maintained against the defendant (regarded simply as a stakeholder) by a contributor who has, before the money is paid over, given him notice not to part with his contribution; although the notice is not given until after the event has happened on which the stakes were to be paid over. It is to be observed, however, that it is essential to the title of the person seeking to recover that he should give notice of his claim to the stakeholder before he parts with the fund in his hands.

The opinion of the Court is asked whether the competitors are entitled to have the sum of £23,628. 14s. returned to them. This question is put in an action for administration of the trusts of the money in Court. Now, in my opinion, these moneys are not affected by any trust which the Court can administer. So far as they are impressed with any trust, it is one which has arisen out of an illegal transaction, and neither the plaintiff nor the defendant Pearson is entitled to the assistance of the Court in administering it. The right of each unsuccessful competitor to

obtain a return of his contribution is a legal right, enforceable by action at law, to which, on the principle laid down in *Browning v. Morris*, the payment into Court in this present action would appear to be no defence. Further, I think that the Court should be very slow to lend its assistance towards extricating any person from difficulties in which he had become involved by embarking in transactions prohibited by statutes passed for the protection of the public against imposition....As regards the defendant Pearson, no imputation is, or can be, made on his good faith or honesty. He appears to have carried through a large number of competitions without any interference. It would seem the best and simpler course that the fund should be returned to the defendant Pearson, who will then be able to defend himself by means of it against any legal claims, and to dispose of the surplus in such way as he may deem himself in honour bound to apply it.

CARLILL v. THE CARBOLIC SMOKE BALL COMPANY.

As to the illegality of Wagers, see this case, *supra*, p. 18.

Ex parte WOLVERHAMPTON AND STAFFORDSHIRE BANKING COMPANY. *In re* CAMPBELL.

QUEEN'S BENCH. 1884.

L.R. 14 Q.B.D. 32.

[*Bankruptcy—Illegal consideration.*]

APPEAL from the Wolverhampton County Court.

David Campbell kept an account with the Wolverhampton and Staffordshire Banking Company; which was overdrawn. On December 22nd, he had an interview with the manager of the bank, and requested him to cash two cheques for sums amounting to 96*l.* 4*s.* The manager consented to do this, on Campbell's undertaking to pay 10*l.* into the bank at once, and to pay the rest of the 96*l.* 4*s.* on December 26th. The bank cashed the cheques; but Campbell did not pay in the sums he had promised. On December 29th he filed a liquidation petition of which the bank received notice the same day. The bank obtained a summons against Campbell, to answer a charge of having obtained credit by fraud, contrary to sub-s. 1 of s. 13 of the Debtors Act, 1869. January 11th was fixed for the hearing of the summons. On January 10th, Ebenezer Hunter, an uncle of Campbell's wife, had an interview with the solicitors of the bank; and they arranged with him that they would consent to an application to the magistrate on behalf of Campbell for the withdrawal of the summons, on his undertaking to pay the bank the 96*l.* 4*s.* and 10*l.* 10*s.* for costs. Hunter signed an undertaking to that effect. When the summons came on to be heard, Campbell's solicitor applied to the magistrate to allow it to be withdrawn; the solicitors of the bank consented; and the magistrate allowed it. After this Hunter went to the bank and paid the 106*l.* 14*s.* The proceedings under the liquidation petition fell through; and Campbell was afterwards adjudicated a bankrupt. The trustee in the bankruptcy applied to the county court for

an order that the bank should pay the 106*l.* 14*s.* to him; on the ground that it formed part of the estate of the bankrupt. There was evidence that Hunter paid the 106*l.* 14*s.* to the bank in coin which he had previously received from the bankrupt's wife; and that she had taken the money out of a bag of money which her husband had handed to her for the purpose. The bank manager and the bank's solicitor deposed that they believed that Hunter was paying the bank his own money, and that he did not state to them the source from which he had obtained it. The judge ordered the bank to pay the 106*l.* 14*s.* to the trustee; on the ground that money belonging to the bankrupt's creditors had been paid to stifle a prosecution. The bank appealed.

Cooper Willis, Q.C., for the appellants. The money was given to Hunter by the bankrupt's wife; she having taken it out of a bag belonging to her husband. Hunter got a legal title to the money. At any rate, he represented to the bank that he was not paying the money to them as the bankrupt's agent.

[STEPHEN, J. What has the knowledge of the bank to do with the matter?]

Money can be followed only when there is a trust.

[CAVE, J. I do not agree to that proposition. If money is ear-marked it can be followed; although if it is used by the wrongdoer to pay a debt of his own, the creditor to whom it is paid may be entitled to keep it.]

Hunter paid the money in discharge of an obligation.

[STEPHEN, J. If he had paid the money in discharge of a debt of his own, or had paid it to the credit of his overdrawn current account with his bankers, it could not be followed. But he was under no obligation to pay the bankrupt's debt to the bank.]

He had given a written undertaking to pay it. A fraud committed by the bankrupt cannot destroy the title of a person who had no notice of the fraud.

[CAVE, J. If Hunter had paid the money away in discharge of a debt of his own the payee would have a good title to it, but surely not if he paid it away voluntarily.]

Hunter paid it away as his own money in discharge of his undertaking to the bank. There was nothing improper in the transaction so far as the bank were concerned.

[STEPHEN, J. Was there a good consideration as between Hunter and the bank for money paid to stifle a prosecution?]

No felony had been committed. It is not enough to shew that the bank were induced by the payment to abstain from prosecuting *Campbell: Flower v. Sadler* (L.R. 10 Q.B.D. 572).

[CAVE, J. It is a different thing if the payee enters into an agreement not to prosecute.]

Whatever difficulty there might have been in enforcing the agreement, Hunter paid the money to the bank in discharge of it. The bank must be entitled to retain the money as against him, and they had no notice that the money belonged to any one else. There is no authority for saying that, when a prosecution is only for a misdemeanour, and the tribunal sanctions its withdrawal, the prosecutor is bound to go on with it. The

bank have got possession of the money, and it cannot be taken away from them. There has been no offence against the bankrupt law, and, therefore, the trustee stands in no better position than the bankrupt himself would have stood if there had been no bankruptcy: *Ex parte Caldecott* (L.R. 4 Ch. D. 150). The bankrupt himself could not have recovered the money. There was no agreement to withdraw the prosecution; it was at the most an agreement not to press it....

CAVE, J. A prosecution had been commenced by the bank against the bankrupt. If commenced on good grounds, it ought to have been proceeded with, and not made an instrument for obtaining payment of the bank's debt. If commenced on bad grounds, that makes the case still worse for the bank, for then it must have been commenced only with the object of obtaining payment of the debt. Hunter comes to the bank and offers to pay the debt if they will withdraw the prosecution; and they agree to this. This was an illegal contract, an agreement to interfere with the course of justice and stifle a prosecution. Consequently there was no consideration for the payment of the money. But, both parties being *in pari delicto*, Hunter could not have recovered the money from the bank.

The money, however, was not the money of Hunter; it was furnished by Campbell; and, by virtue of the relation back of the trustee's title to the act of bankruptcy, it was the money of the trustee and had ceased to be the money of Campbell. This distinguishes the case from *Ex parte Caldecott*, for there no act of bankruptcy had been committed prior to the execution of the bill of sale (the validity of which was in question), and the property was not that of the trustee at the time when the bill of sale was executed. There are no doubt cases in which money cannot be recovered by the rightful owner from a person who has obtained possession of it. This is one of the incidents attaching to current coin. If a thief steals a bank note and uses it in paying for goods which he buys, the rightful owner of the note cannot recover it from the vendor of the goods. But, in the present case, if Hunter had not paid the money away to the bank, it cannot be doubted that the trustee could have recovered the money from him. It is true that Hunter has paid away the money to the bank; but the bank have given no consideration for it. The only reason why Hunter could not recover it from the bank is that he is *in pari delicto*. But there is nothing to prevent the trustee from recovering the money from the bank; for nothing had happened to give the bank a better title to it than Hunter had. He had no title to it, and therefore the bank had none.

Appeal dismissed.

ATKINSON v. DENBY.

EXCHEQUER. 1861.

6 H. & N. 778.

[*Illegal payment under pressure.*]

THE action was brought to recover 50*l.*, paid by the plaintiff to the defendant. The plaintiff, a manufacturer, being in embarrassed circum-

stances, offered a composition to his creditors of 5s. in the pound, and a deed of composition was prepared for the purpose of carrying out the offer. The defendant, a creditor for 319*l.*, refused to sign the deed of composition, saying he never would consent to do so unless he got something more. The defendant and the plaintiff met. The defendant eventually agreed to take, in addition to the 5s. in the pound, a bill at six months for 108*l.* and 50*l.* in cash. The defendant knew that several creditors were then waiting to see what he would do. The plaintiff gave the defendant 50*l.* and a bill for 108*l.* The defendant then signed the deed. Five creditors had previously executed it, and twenty signed subsequently to the signature of the defendant. The composition was paid.

Upon these facts the defendant's counsel submitted that there was no evidence to go to the jury, and, Martin, B., being of that opinion, the plaintiff was non-suited.

Overend moved to enter a verdict for 50*l.* The money was paid under coercion.

* * * * *

MARTIN, B. I am of opinion that this money cannot be recovered back. This was a voluntary payment by the plaintiff, with full knowledge of the facts, the money being justly due to the defendant. Now, the law is clear that an illegal contract cannot be enforced; and, as a general rule, money paid under an illegal contract cannot be recovered back: *quod fieri non debet factum valet*. This was an illegal contract. Had it remained unexecuted the creditor could have maintained no action against the debtor in respect of it. But money has been paid under this illegal contract; it cannot be recovered back unless this case is an exception to the general rule. It is argued that the money can be recovered back for this reason, that (as between the plaintiff and defendant) the defendant is the greater delinquent. But the plaintiff owed it to his creditors to deal honestly by them, and who was the greater delinquent towards those creditors? It was the plaintiff himself; because he has committed a breach of faith towards those persons to whom he was bound to act honestly. As to oppression, I do not see why a creditor may not get 20s. in the pound for a debt justly due to him. There is, in my opinion, nothing contrary to law or morality in his so doing.... This was an illegal contract, and money paid under an illegal contract cannot be recovered back. In the case of *Smith v. Cuff*¹, where the debtor was allowed to recover back the money, payment of the promissory note had been enforced against him; he had no defence, and was obliged to pay it. That is quite a different matter from a voluntary payment.

BRAMWELL, B. Nothing can be more dishonest on the part of a creditor than to pretend to take a composition of 5s. in the pound, and then agree privately with the debtor for payment of a larger sum and so get more than the other creditors.... I agree that if a man voluntarily pays money which he was not bound to pay, as a general rule he cannot

¹ [EDITOR'S NOTE. 6 *Man. & Sel.* 160; where Lord Ellenborough said: "One holds the rod; and the other bows to it."]

recover it back. I admit also, that if a man, upon a corrupt bargain, pays money or gives a bill of exchange, he cannot recover it back. But upon this general rule there is engrafted the qualification that, where (though the act is voluntary in one sense) the person for whom it is done has a species of power over the other, so that the latter does the act under coercion, there it is not a case of *par delictum*; because it is a case of oppressor and oppressed. In such cases, though the payment is in a certain sense voluntary, it may be recovered back. If that is not true, *Smith v. Bromley* (2 Doug. 695) and *Smith v. Cuff* (6 M. & S. 160) were wrongly decided. Those cases...have established the qualification I have mentioned. Here it was a payment under coercion; and the parties were not *in pari delicto* because there was an oppressor and an oppressed. At one time I doubted whether the payment ought not to be considered voluntary, in the sense that at the time he paid the money he did not get the benefit of his bargain. The evidence, however, shews that the whole transaction was *uno flatu*; and whether the advantage to be got by the payment occurred at the time it was made, or a week afterwards, seems to me to make no difference. If, indeed, the plaintiff had voluntarily paid the money after the composition was entered into, the case would not have been within the qualification I have mentioned; and *Wilson v. Ray* (10 A. & E. 82) is an authority that the money could not have been recovered back.

WILDE, B....In *Smith v. Cuff*, the bargain was that if the creditor would execute a composition deed with the other creditors to receive 10s. in the pound, the debtor would give him two promissory notes for the remainder of his debt. The deed was executed and the notes given, and one of them got into the hands of a third person who enforced payment from the debtor. Notwithstanding the illegality of the original contract, the debtor recovered the amount from the creditor. That case only differs from the present in this, that here, instead of a promissory note being given, the money was paid at the time of the illegal contract. In my opinion it is the same thing whether the debtor gives his creditor 50*l.* in money or puts into his hands a piece of paper by which payment of 50*l.* may be enforced against him. This case falls within the principle that the parties are not *in pari delicto*, for one was under coercion.

Courts of justice should endeavour to throw every impediment in the way of carrying out a contract to pay money in order to induce one creditor to execute a deed which is a fraud on the other creditors. And—on the ground of public policy, on principle, and on authority—if money has been paid under a fraudulent contract, and the parties are not *in pari delicto*, we ought to hold that it may be recovered back.

[The majority thus deciding for the plaintiff, the defendant appealed to the Exchequer Chamber. But the appeal was dismissed (7 H. & N. 934); Cockburn, C.J., saying, “Both parties are *in delicto*; but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit.”]

[EDITOR'S NOTE. Where an insolvent debtor gave to a creditor, at the time of his signing the composition deed, a private undertaking to make certain future

payments to nominees of the creditor, on the creditor's account (i.e. to pay money to the use of the creditor), it was held that the debtor could recover from the creditor the amount of these subsequent payments, in spite of their not only being a fraud upon the other creditors, but also being voluntary payments which the debtor was not bound to make; (*In re Lenzberg's Policy* (L.R. 7 Ch. D. 650).]

KEARLEY v. THOMSON.

COURT OF APPEAL. 1890.

L.R. 24 Q.B.D. 742.

[*Illegal Contract—Partial Performance.*]

THE defendants were solicitors, and acted for a client in presenting a petition in bankruptcy against one William Clarke. A receiving order was made. The costs of the petitioning creditor were ordered to be paid out of the estate. Before the public examination of the bankrupt came on the plaintiff (a friend of the bankrupt), had an interview with the defendants, at which a discussion arose as to the defendants' costs in the bankruptcy proceedings, none of which, from want of assets in the bankruptcy, had been paid. The defendants undertook not to attend the debtor's public examination or oppose his discharge, provided the plaintiff paid them an agreed sum for such costs. The plaintiff accordingly paid to the defendants 20*l.*, for which the following receipt was given: "At the request of Mr Kearley we have received from him the sum of 20*l.* on account of our costs herein, and he is to pay us before twelve to-morrow the further sum of 20*l.*; and in consideration of this sum of 40*l.* we waive all our claim for costs, and undertake not to appear at the bankrupt's public examination, nor to oppose his order of discharge. Thomson & Ward." The further sum of 20*l.* was paid to the defendants. The arrangement was made by the defendants with the consent of their client and for his benefit. The debtor passed his public examination, at which the defendants did not appear. At the time the action was brought the debtor had not applied for his order of discharge. The plaintiff claimed a return of the 40*l.* that he had paid to the defendants as above mentioned. The defendants offered to have their costs taxed, and to return to the plaintiff the balance (if any) that might remain of the 40*l.*, after deducting the taxed costs. The plaintiff refused this offer and brought this action for the return of the money he had paid. The case was tried before Field, J., and the parties were left to move for judgment. The Queen's Bench Division ordered judgment to be entered for the defendants. The plaintiff appealed.

Crump, Q.C., in support of the appeal. The contract was illegal: *Hall v. Dyson* (17 Q.B. 785). The plaintiff is not trying to make out his case through the medium of the illegal transaction; which is the test laid down in *Taylor v. Chester* (L.R. 4 Q.B. 309), for determining whether the plaintiff and defendant are *in pari delicto*. He is trying to set aside the transaction. He can do this so long as the contract is not fully carried out, for the money remains his, and he can recover it back. This is the effect of *Taylor v. Bowers* (L.R. 1 Q.B.D. 291), and of *Herman v. Jeuchner* (L.R. 15 Q.B.D. 561).

FRY, L.J....The tendency of such a bargain as that entered into between the plaintiff and the defendants is obviously to pervert the course of justice. Although the defendants were under no obligation to appear, they certainly were under an obligation not to contract themselves out of the opportunity of appearing. The agreement must be taken to be illegal.

As a general rule, where the plaintiff cannot get at the money which he seeks to recover without shewing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*. There is another general rule, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the 40*l.* cannot recover it back without shewing the contract upon which it was paid, and when he shews that he shews an illegal contract. The general rule applicable to such a case is in *Collins v. Blantern* (*supra*, p. 299), "You shall not have a right of action when you come into a court of justice in this unclean manner." To that general rule there are undoubtedly exceptions. One¹ is the case of oppressor and oppressed; in which case usually the oppressed party may recover the money back from the oppressor. The *delictum* is not *par*, and therefore the maxim does not apply. Again², there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void under the old statutes for usury, and other statutes, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other; notwithstanding that both have been parties to the illegal contract.

There is suggested to us a third exception, and the authority for which is in the case of *Taylor v. Bowers*. In that case Mellish, L.J., in delivering judgment, says at p. 300: "If money is paid, or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out." This proposition is to be found in no earlier case than *Taylor v. Bowers* in 1867. I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may require consideration, if not in this Court, yet in a higher tribunal: and in that view I have the entire concurrence of the Lord Chief Justice. But even assuming the exception to exist, does it apply to the present case? What is the condition of things if the illegal purpose has been carried into effect in a material part, but remains unperformed in another material part? The contract was that the defendants should not appear at the public examination of the bankrupt or at the application for an order of discharge. It was performed as regards the first; but the other application has not yet been made. Can it be contended that, if the illegal contract has been partly carried into effect and partly remains

¹ [EDITOR'S NOTE. See *Atkinson v. Denby*, *supra*, p. 314.]

² [EDITOR'S NOTE. See the quotation from *Browning v. Morris* in *Barclay v. Pearson*, *supra*, p. 311.]

unperformed, the money can still be recovered? In my judgment it cannot be so contended with success. Suppose a payment of 100*l.* by A to B on a contract that the latter shall murder C and D. He has murdered C., but not D. Can the money be recovered back? In my opinion it cannot be.

I hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back. We were pressed with the observations of Lord Esher, M.R., in *Herman v. Jeuchner*; where (it was said) he had recognised the proposition that so long as the contract remained imperfectly performed the money could be recovered back. In my opinion, the language used by the Master of the Rolls does not bear that construction, because in that case the Court thought the contract had been fully performed, and, therefore, no doubt, in speaking of performance he spoke of full performance. But (whatever the construction of those words may be), I have the authority of the Master of the Rolls to state his concurrence with the view I have expressed with regard to the partial performance of an illegal contract.

Appeal dismissed.

NORDENFELT v. MAXIM-NORDENFELT G.A. CO., LD.

HOUSE OF LORDS.

L.R. [1894] A.C. 535.

[*General Restraint of Trade.*]

[NORDENFELT was a maker of quick-firing guns, for some improvements in which he had obtained patents. In 1886 he sold his business and patents to the N.G.A. Company, with a covenant not to compete in any way with that company. In 1888, by an instrument *to which he was a party*, the N.G.A. Company was incorporated along with another body, the M.G. Company, in a new body to be called the Maxim-Nordenfelt Guns and Ammunition Company; the N.G.A. Company undertaking to procure Nordenfelt's covenanting with the new company that he would not compete with it. By an agreement made in September 1888 he accordingly covenanted with it that for twenty-five years he would not (except on behalf of the new company) engage, either directly or indirectly, in the business of a manufacturer of guns or ammunition, or in any business competing with that carried on by the company.]

This covenant having been broken, the company brought an action for an injunction. Romer, J., held the covenant to be void, as unreasonable. The Court of Appeal held it to be too wide, but valid as to guns and ammunition. Nordenfelt appealed to the House of Lords.]

Appellant, in person. In *Tallis v. Tallis* (1 E. & B. 391), Lord Campbell, C.J., expressly stated that though the restriction may be unlimited in respect of Time, there must be some limit of Space. It cannot be the law that a man should be prevented from earning his living in every part of the wide world. The true principle is that the restraint must not be

wider than is necessary for the protection of the covenantee: *Rousillon v. Rousillon* (L.R. 14 Ch. Div. 351); *Mills v. Dunham* (L.R. [1891] 1 Ch. 576). The present case does not come within any of the exceptions to the general principle against restraints of trade. The business was sold without reserve, and the covenant was not made in connection with the sale of the business; and is thus doubly void, as there was no consideration, and the restraint is in effect universal, both as to time and space. Further, it would be against public policy to enforce the covenant; as the special knowledge acquired is no longer available for the service of the British Government. Besides, the respondents are sufficiently protected by their patents; and to enforce the covenant would be an indirect and illegitimate method of prolonging or extending those patents.

* * * * *

LORD HERSCHELL, L.C....I think the case must be treated on precisely the same footing as if the obligations of the covenant had been undertaken in connection with a direct transfer to the respondents of the goodwill of the appellant's business and with the object of protecting it....

LORD MACNAGHTEN....In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void; *Colgate v. Bachelar* (Cro. Eliz. 872). In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required gradually and not without difficulty; until it came to be recognised that all partial restraints might be good, though it was thought that general restraints (that is, restraints of general application extending throughout the kingdom) must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable; not because there was any inherent or essential distinction between the two cases. "Where the restraint is general," says Lord Macclesfield, in *Mitchel v. Reynolds* (1 P. Wms. 181) "not to exercise a trade throughout the kingdom," the restraint "must be void; being of no benefit to either party, and only oppressive....What does it signify to a tradesman in London what another does at New castle? And surely it would be unreasonable to fix a certain loss on one side without any benefit to the other."...

The true view at the present time I think, is this. The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade, and interference with individual liberty of action, may be justified by the special circumstances of a

particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public; so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

* * * * *

LORD MORRIS....We have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time or space must always be a most important factor in the consideration of reasonableness; though not *per se* a decisive test. If the consideration of reasonableness or of public interest is the rule, the appellant in my opinion has no case. The portion of his business which consisted of manufacturing guns and gunpowder explosives was one which would almost altogether be with Governments, foreign as well as at home, and wherever carried on would necessarily be in injurious competition with the respondents.

Appeal dismissed.

CHAPTER VII

AGENCY

PICKERING v. BUSK, ASSIGNEE OF HAYWARD.

KING'S BENCH. 1812.

15 EAST, 38.

[*Implied authority.*]

SWALLOW, a broker in London, engaged in the hemp trade, purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying in Southwark. The hemp was delivered to Swallow, at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of Swallow. Shortly afterwards Swallow purchased for the plaintiff another parcel of hemp, lying at Wapping, which latter parcel was transferred into the names of "Pickering (the plaintiff), or Swallow." Both these parcels of hemp were duly paid for by the plaintiff. Swallow, however, whilst the hemp remained thus in his name, having contracted with Hayward and Co., as the broker of Blackburn and Co., for the sale of hemp, and having none of his own to deliver, transferred into the names of Hayward and Co. the above parcels in satisfaction of that contract, for which they paid him the value. Hayward and Co. shortly after became bankrupts; and the plaintiff, discovering these circumstances, demanded the hemp of the defendants (their assignees), and upon their refusal to deliver it the present action was brought. Lord Ellenborough, C.J., was of opinion that the transfer of the hemp, by direction of the plaintiff, into Swallow's name, authorized him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside.

The Attorney-General moved for a new trial. The principal in this case, by authorizing the transfer to be made into the name of his broker, had done no more than was usual in the course of that business; and therefore gave no authority to the broker, his agent, to transfer the property without his direction. Where by the ordinary course of trade the possession of goods is left with an agent, he cannot dispose of it as his own, but the purchaser must look to his authority. Such is the case of a factor; who by the usage of trade has authority to sell, but not to pledge¹. Therefore, though he (like the broker in this case) be the apparent owner, yet his pledge will not bind the principal. In *M'Combie v. Davies* (7 East 5), where an assignment of tobacco in the King's

¹ [EDITOR'S NOTE. To meet the needs of modern mercantile credit, the Legislature has removed this disability. By s. 2 of the Factors Act, 1889, every mercantile agent authorized to sell, and placed by the owner's consent in possession of goods, or of the documents of title to them, can validly sell, or *pledge*, or otherwise dispose of them.]

warehouse had been taken, by way of pledge, from the broker who had purchased it there in his own name for his principal, it was held that the pawnee could not retain it against the principal.

[THE COURT distinguished between that case, which was the case of a *pledge*, and beyond the scope of a broker's general authority; and this, which was the case of a sale and within his general authority.]...If Swallow had not the hemp for the purpose of sale, for what purpose had he it? For the purpose of safe custody, and for the convenience of the owner. The world had no right to conclude from the circumstance of the goods being in his name, that therefore he had the power of disposing of them.... If one entrust a chest of tea, for the purpose of safe custody, to a grocer who deals in such commodity, and whom the world therefore might suppose to have the property in the chest, and he sell it, the chest remaining unbroken, without doubt the owner may recover it from the vendee. For the grocer was only entrusted with the custody; and in cases of this kind the rule of *caveat emptor* applies....In *Wilkinson v. King* (2 Camp. 335), which was trover for lead, it appeared that the plaintiff had sent the lead to a wharfinger who was accustomed to sell lead: and he sold it to the defendant, who bought it *bonâ fide*: yet it was held that the plaintiff was entitled to recover.

LORD ELLENBOROUGH, C.J. That was the case of a wharfinger, whose proper business it was not to sell; and to whom the goods were sent for the mere purpose of custody.

...If the principal send his commodity to a place, where it is the ordinary business...to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe....

BAYLEY, J. If a person put goods into the custody of another, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. Swallow was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract, because no express authority was given to Swallow to sell. But is it competent to him so to do? If the servant of a horse-dealer with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed¹.

New trial refused.

¹ [EDITOR'S NOTE. "In such a case there is an ostensible authority to do that which is usual in the business of a horse dealer. [But] if the servant of a private individual, entrusted on one occasion to sell a horse, takes upon himself, without authority from his master, to warrant the soundness of the animal, the master is not bound." *Per Byles, J., in Howard v. Sheward* (L.R. 2 C.P. 148).]

BOLTON PARTNERS v. LAMBERT.

COURT OF APPEAL. 1888.

L.R. 41 CH. D. 295.

[Unauthorized agency—Subsequent ratification.]

[SCRATCHLEY, who was the agent of the plaintiffs, received from the defendant an offer to buy from the plaintiffs their factory. Scratchley, without due authority from the firm, accepted this offer on Dec. 13th. But on Jan. 13th, the defendant wrote to the plaintiffs that he had mistaken the value of the property, and that he therefore withdrew his offer. On Jan. 17th the plaintiffs commenced this action, claiming specific performance; and on Jan. 28th, they confirmed the acceptance made on Dec. 13th. The defendant contended that there had been no complete contract; and that, after his withdrawal of his offer, any ratification came too late.]

* * * * *

Brice, Q.C., for defendant....An offer may be withdrawn without formal notice at any time before acceptance, *Dickinson v. Dodds* (L.R. 2 Ch. D. 463, *supra*, p. 49); after withdrawal a ratification comes too late. Thus, in *Lyell v. Kennedy* (L.R. 18 Q.B.D. 796), it was held that ratification after the Statute of Limitations had run came too late.... Stoppage *in transitu* by a person having no authority cannot be ratified after the goods have got into the hands of third parties; *Bird v. Brown* (4 Ex. 786). In *Brewer v. Broadwood* (L.R. 22 Ch. D. 105) the principle was acted on that ratification must be before the contract is broken off.

COTTON, L.J....The rule as to ratification by a principal of acts done by an assumed agent is, that the ratification is thrown back to the date of the act done; and that the agent is put in the same position as if he had had authority to do the act at the time the act was done by him¹. The case of *Hagedorn v. Oliverson* (2 M. & S. 485) is a strong case of the application of the principle. It was there pointed out how favourable the rule was to the principal, because till ratification he was not bound [and so might refuse to pay the premium], and he had an option to adopt or not to adopt what had been done. In that case the plaintiff had effected [in the names of himself and of all persons to whom the ship "does or may appertain"] an insurance on a ship in which another person was interested; and it was held that, long after the ship had been lost, that other person might adopt the act of the plaintiff, though done without authority, so as to enable the plaintiff [though not interested in the ship] to sue upon the policy. Again in *Ancona v. Marks* (7 H. & N. 686), a bill was indorsed to, and sued on in the name of, Ancona who had given no authority for that purpose; yet it was held that Ancona could, after the action had been brought, ratify what had been done; and that the subsequent ratification was equivalent to a prior authority

¹ [EDITOR'S NOTE. But if a man contract *in his own name*, in the expectation that another person will ratify the transaction, but without authority from him and without disclosing the expectation to the other contracting party, any ratification by the intended principal will be void. For "civil obligations are not to be founded upon undisclosed intentions." *Keighley M. & Co. v. Durant*; (L.R. [1901] A.C. 240).]

so as to entitle Ancona to sue upon the bill....The rule as to ratification is of course subject to some exceptions. An estate once vested cannot be divested¹, nor can an act lawful at the time of its performance be rendered unlawful, by the application of the doctrine of ratification....

* * * * *

LOPES, L.J....If Scratchley had acted under a precedent authority the withdrawal of the offer by the defendant would have been inoperative. It is equally inoperative where the plaintiffs have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect. To use the words of Baron Martin in *Brook v. Hook* (L.R. 6 Ex. 96), the ratification would not be "dragged back as it were, and made equipollent to a prior command."...

Appeal dismissed.

[EDITOR'S NOTE. The principle will not apply unless the ratification be made within a reasonable time; e.g., before the date for beginning to perform the contract has arrived; (6 T.L.R. 217). Similarly the invalid attempt of an unauthorized person to exercise an option of purchase cannot be ratified after the specified time for exercise has expired; *Dibbins v. Dibbins* (L.R. [1896] 2 Ch. 348). See note to *Schmaltz v. Avery*, *infra*. Indeed, in *Fleming v. Bank of New Zealand* (L.R. [1900] A.C. at p. 587) the Judicial Committee went so far as to say that "*Bolton v. Lambert* presents difficulties; and their Lordships reserve their liberty to reconsider it." American authorities also incline against it; in *McClintock v. S.P.O. & Co.* it was held that an acceptance *cannot* be ratified after the withdrawal of the offer; (28 Am. State Rep. 785).]

KELNER v. BAXTER AND OTHERS.

COMMON PLEAS. 1866.

L.R. 2 C.P. 174.

[Professed agent yet no principal.]

THE plaintiff was a wine merchant, and the proprietor of the Assembly Rooms at Gravesend. It was proposed that a company should be formed for establishing an hotel at Gravesend, to be called "The Gravesend Royal Alexandra Hotel Company, Limited," of which the following gentlemen were to be the directors, viz. Mr L. Calisher, Mr T. H. Edmunds, Mr M. Davis, Mr Macdonald, Mr Hulse, Mr N. J. Calisher (one of the defendants), and the plaintiff. The plaintiff was to be the manager of the proposed company; and Mr Dales (another of the defendants) was to be the permanent architect. The company was to purchase the premises of the plaintiff for a sum of 5000*l.*, of which 3000*l.* was to be paid in cash, and 2000*l.* in paid up shares, the stock, &c., to be taken at a valuation. This was carried into effect; the defendant Baxter being the nominal purchaser on behalf of the company. On January 9th, 1866, a memorandum of association was executed by the plaintiff and the defendants and others.

¹ [EDITOR'S NOTE. Thus an unauthorized agent's attempt to stop goods *in transitu* cannot be ratified by the vendor after the transit is over, so as to divest the purchaser's ownership of them; *Re Gloucester* (L.R. [1901] 1 Q.B. 683).]

Pending the negotiations the business had been carried on by the plaintiff, and for that purpose additional stock had been purchased by him; and on January 27th, 1866, an agreement was entered into for the transfer of this additional stock to the company for the sum of 900*l.*, payable on the 28th of February, 1866....The offer was thus accepted:

"To Mr John Kelner.

Sir,—We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed.—J. D. Baxter, N. J. Calisher, J. Dales, On behalf of the Gravesend Royal Alexandra Hotel Company, Limited."

In pursuance, the goods in question were handed over to the company, and consumed by them in the business of the hotel. On February 1st a meeting of the directors took place, at which a resolution was passed: "That the arrangement entered into by Messrs Calisher, Dales, and Baxter, on behalf of the company, for the purchase of the additional stock on the premises...amounting to 900*l.*, be, and the same is hereby ratified." (There was also a subsequent ratification *by the company*, viz. on the 11th of April, but this was after the commencement of the action.) On February 20th, the company obtained a certificate of incorporation. The company having collapsed, the present action was brought against the defendants upon the agreement of the 27th of January.

On the part of the defendants oral evidence was tendered for the purpose of shewing that it never was intended that they should be personally liable; but Erle, C.J., rejected it. It was then submitted that, inasmuch as the agreement was not entered into by the defendants personally but only as agents for the hotel company, they thereby incurred no personal obligation to the plaintiff, who was himself one of the promoters. For the plaintiff it was insisted that, there being no company in existence at the time of the agreement, the parties thereto had rendered themselves personally liable; and that there could be no ratification of the contract by a subsequently created company.

A verdict was taken for the plaintiff for 900*l.*, subject to leave reserved to the defendants to move to enter a nonsuit.

* * * * *

Seymour, Q.C., moved accordingly; and also for a new trial on the ground of misdirection on the part of the learned judge, in not allowing witnesses to be called to contradict the plaintiff as to the defendants' personal liability. The circumstances shewed an evident intention to exclude personal liability in those who signed the agreement. The arrangement had reference exclusively to the formation of a company in which the plaintiff himself had a deep interest. The day for payment was inserted because all parties were satisfied that the business of the company would then have commenced. The agreement was made on behalf of the company, which was known to be in the course of formation; and the company ratified it when formed. In *Aggs v. Nicholson* (1 H. & N. 177) a note signed by two directors of a completely registered joint stock company, expressed to be made "by and on behalf of the company,"

was held to be binding on the company, and not on the persons who signed it....Both parties to the agreement had equal knowledge of the circumstances; and the subsequent recognition of the authority was sufficient....The defendants were prepared with overwhelming evidence to shew that it was never the intention of the parties that those who did the mere formal act of signing the agreement should be personally liable.

[BYLES, J. No evidence could exclude personal liability in the defendants, if the written document itself make them liable.]

The surrounding facts may always be looked at to shew the intention of the contracting parties.

ERLE, C.J....A difficulty has arisen because the plaintiff has at the head of the paper addressed it to the defendants, "on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited," and the defendants have repeated those words after their signatures to the document; and the question is, whether this constitutes any ambiguity on the face of the agreement, or prevents the defendants from being bound by it. I agree that if the company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally¹. Where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made....The paper expresses in terms a contract to buy. And it is a cardinal rule that no oral evidence shall be admitted to shew an intention different from that which appears on the face of the writing.

WILLES, J....Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done—by a person in existence; either actually, or in contemplation of law, as in the case of assignees of bankrupts, and administrators, whose title vests by relation....The company never could be liable upon this contract: and, construing this document *ut res magis*

¹ [EDITOR'S NOTE. "The contract of the subscriber of a Memorandum of Association is very peculiar. Down to the moment [of registration] there is no contract at all: because the corporation does not exist. At the moment of registration the company springs into existence; and the subscribers to the memorandum become members of the company" (L.R. [1902] 1 Ch. 709).]

valeat quam pereat, we must assume that the parties contemplated that the person signing it would be personally liable. Putting in the words "On behalf of the G.R.A. Hotel Company," would operate no more than if a person should contract for a quantity of corn "On behalf of my horses."

BYTES, J....Ratification must be by an existing person, on whose behalf the contract might have been made at the time. That could not be so here: a subsequent ratification by the company could only be with the assent of the plaintiff; and then it would be a new contract. Mr Seymour contended that the contract might amount to a personal undertaking on the part of the defendants that the company shall pay. That would make them equally liable. [He cited *Meriel v. Wymondsold* (Hardr. 205), and *Cullen v. Queensbury* (1 Bro. C.C. 101).]

KEATING, J....The length to which the Courts have gone upon this subject is strongly illustrated by the case of *Furnivall v. Coombes* (5 M. & G. 736)....

* * * * *

Judgment for plaintiff.

[EDITOR'S NOTE. Cf. L.R. [1904] A.C. at p. 126.

Hence the idea "that a Company, merely because it has obtained the advantage of a solicitor's work done before the formation of the company (e.g. in preparing its articles of association) is liable in equity for the costs of that work" is wholly untenable (L.R. [1906] 2 Ch. at p. 442) In *Wilson v. Baker* (17 T.L.R. 473) Parliamentary agents had inserted in a newspaper an advertisement of the intended application to Parliament for a Bill to incorporate a proposed Railway Company. Though they were known to the proprietor of the newspaper to be acting only as Parliamentary agents, they were held to be liable as principals; since the Company was not in existence.]

COLLEN v. WRIGHT.

EXCHEQUER CHAMBER. 1857.

8 ELLIS & B. 647.

[*Named principal but no authority.*]

THE testator Wright was land agent for a gentleman named Gardner, and, as such, made an agreement with the plaintiff for the lease to him of a farm of Gardner's. A formal agreement between landlord and lessee was drawn up and signed by the testator in the following form: "Robert Wright, agent to William Dunn Gardner Esquire, lessor." It was also signed by plaintiff. The plaintiff entered on the farm on the strength of this agreement. Mr Gardner refused to execute any such lease, as he had conferred on the testator no authority to agree for a lease for so long a term. The plaintiff had commenced a suit in Chancery against Gardner for a specific performance. On discovering the ground of defence, his solicitors sent to Wright a formal notice that, unless they received from Wright notice to the contrary, the plaintiff would proceed with the suit at Wright's expense; and, in the event of his bill being dismissed on the ground of the absence of authority, would commence an action

to recover the costs, and other damages, by reason of Wright's want of authority. Wright's solicitor sent an answer, dated 11th April, 1855, denying Wright's liability to any action, but not containing any admission that Wright had not had full authority. The suit was proceeded with, and the bill dismissed with costs, on the ground that Wright had no authority from Gardner to sign the agreement. The case in the Queen's Bench was stated after Wright's death, and submitted two questions to the Court: 1. Whether the plaintiff is entitled to maintain an action against the defendants, as executors of Wright, to recover damages? 2. Whether, if so, the whole of the damages sustained by the plaintiff, including his costs of the said suit in Chancery can be recovered; or, if some only, which of them, and to what extent? The Court of Queen's Bench ordered that judgment should be "entered for the plaintiff for such amount of damages as shall include money laid out and costs of Chancery suit." The defendants appealed.

Phipson, for the defendants....If there had been any deceitful representation by Wright, that would have given ground for an action in tort against him whilst he lived; but against the representatives the only question is whether there was a contract. The appellants contend that there is no contract, and that, in the absence of fraud or deceit, no action would have lain against the testator himself....In *Collins v. Evans* (5 Q.B. 820), Tindal, C.J., says, "The plaintiff, being ignorant of the state of his debtor's solvency, makes inquiry of those who have better means of knowledge than himself; and yet, in all those cases, if the answer given is honest, though untrue in point of fact, the action has been held not to be sustainable."

[POLLOCK, C.B. It will probably not be disputed that a representation is not actionable unless dishonestly made, or unless it be a warranty. But, in deciding whether there is a warranty or not, you must not reject the position of the parties and the nature of the representation....Thus, though there is no implied warranty of the condition of victuals sold by an ordinary person, there may be one where the sale is by a victualler; *Burnby v. Bollett* (16 M. & W. 644).]

Here the intention of both the plaintiff and the testator was to make a contract between the lessor and the lessee. If the testator had been asked if he would warrant that he had authority, he might have answered that he believed he had, but that he would warrant nothing....If there was a warranty, the defendants would have been equally liable although the facts had been that their testator was, without any negligence, deceived by a forged power of attorney, or even if he had had full authority, which had, without his knowledge, been revoked by the death of his principal abroad before the agreement was made. It cannot be supposed that a warranty to this extent could be intended....

[WATSON, B. Till *Jenkins v. Hutchinson* (13 Q.B. 744)¹, it was generally supposed that the manner in which a person professing to be an

¹ [EDITOR'S NOTE. The action was on a charterparty which Hutchinson had, on the face of it, executed as agent for one Barnes. Barnes had given him no authority. The Court held he could not be sued as principal without shewing that he really was so.]

agent might be made liable was by treating him as principal in the contract he professed to make.]

Assuming that there is a cause of action, the costs of the Chancery suit cannot be recovered. They were not a necessary consequence of the want of authority. The test is said to be whether a reasonable and prudent man would have adopted this course. Here the plaintiff was informed that there was no authority; and he persisted in proceeding as if there was. That was unreasonable, unless he did so at his own peril.

[COCKBURN, C.J. He was informed by Gardner that there was no authority. If he had been so told by the testator I should have felt your remark to be very forcible: but, as a reasonable man, he might well proceed in the suit when, having informed the testator of his intention, he received an answer not admitting that there was no authority.]

The damage is not the natural and contemplated consequence of the contract; *Hadley v. Baxendale* (9 Exch. 341; *infra*, ch. ix).

[WILLIAMS, J. If there was a promise that the landlord contracted to grant the lease, the parties must have contemplated that the lessee would take steps against the landlord to enforce that contract.]

WILLES, J., delivered the following judgment, in which POLLOCK, C.B., WILLIAMS, J., and BRAMWELL, WATSON and CHANNELL, Bs., concurred.

The judgment of the Court of Queen's Bench ought in all respects to be affirmed. A person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence in no way alleviates the inconvenience and damage. A person, professing to contract as agent for another, undertakes impliedly, if not expressly, to the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise. Indeed the contract would be binding upon the person dealing with the professed agent if the alleged principal were to ratify the act of the latter.

All the expenses sought to be recovered were occasioned by the assertion of authority, made at the time of the contract, being continued and persisted in by the defendant's testator, and *bonâ fide* acted upon by the plaintiff. That assertion was never withdrawn, not even in the letter of 11th April, 1855, long after the proceedings in Chancery had commenced.

COCKBURN, C.J....The doctrine that a person professing, without sufficient authority, to act as agent, might be made responsible *as principal* was only subverted at a comparatively recent period....It occurred to the judges who decided in *Lewis v. Nicholson* (18 Q.B. 503) that an action would not lie against the agent as principal, to suggest that, possibly, the agent might, under such circumstances, be held liable

on an implied contract that he had authority to contract in the name of the principal. And the opinion thus incidentally thrown out in that case has been acted upon in this....I do not think we are justified in introducing such a remedy by the mere fiat of a judicial decree. I do not stop to discuss the expediency or policy of the proposed rule....My view is, that this implied contract, which we are called upon to establish in this case, is a thing unknown to our law. A supposed liability having turned out to be unfounded in law, we are now creating a new species of liability on a new contract, now for the first time to be implied, as to a warranty of authority which, if the party now to be charged had been required expressly to give, he would probably have refused. If it is desirable to establish such a rule, it seems to me it should be done by legislative enactment. In all humility and with the utmost deference to the better opinion of my colleagues, I feel it my duty to record my protest.

Judgment affirmed.

[EDITOR'S NOTE. The Chief Justice's emphatic protest has not prevented the rule from being accepted and developed. In *Starkey v. Bank of England* (L.R. [1903] A.C. 114) a broker, acting under a forged power of attorney, which he believed to be genuine, induced the Bank of England to transfer consols to a purchaser. The Bank had to make good the stock to the true owner. The broker was held liable, on his implied warranty of authority, to indemnify the Bank for the cost of doing so. This decision shews that the rule in *Collen v. Wright* is not limited to cases where the agent has made a contract but will apply to any kind of transaction into which he may have entered for his (supposed) principal. Cf. *Bank of England v. Cuttle* (L.R. [1907] 1 K.B. 889).

In *Yonge v. Toynbee* (L.R. [1910] 1 K.B. 224) the Court of Appeal applied the rule to the case of a solicitor who had continued to act in litigation for a client after (without his knowing of it) his client had been certified insane. Thus a person who assumes to act as agent, yet is not authorized, is liable on his implied warrant of authority, not only in cases of (1) fraud, or (2) (as in *Polhill v. Walter*, *supra*) of express though innocent misrepresentation, but also (3) where he fully believes himself to have authority, and even may originally have had it although it has ceased through facts which he had not the means of knowing. (This is an exception to the general rule that damages cannot be recovered for an honest misrepresentation. But the principle will not apply if he frankly disclosed to the other party the absence of authority; so that the latter accepted the risk of non-ratification; *Halbot v. Len* (L.R. [1901] 1 Ch. 344).]

SCHMALTZ v. AVERY.

QUEEN'S BENCH. 1851.

16 Q.B. 655

[Agent afterwards assumes character of principal.]

ASSUMPSIT on a memorandum of charter between the defendant as ship owner and the plaintiff as freighter. Breach: that defendant would not receive cargo. Plea: Non assumpsit. Issue thereon. Other issue of fact which it is unnecessary to state.

The plaintiff carried on business under the firm of Schmaltz & Co. The execution of a charter party by the defendant was proved. It was expressed to be made between the defendant as owner of the ship of the

one part "and G. Schmaltz & Co. (agents of the freighter) of the other part." At the end of the charter party there was a memorandum in these terms. "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." Oral evidence was given that the plaintiff was in truth principal. Wightman, J., directed a verdict for the defendant on the issue upon Non assumpsit, leave being reserved to move to enter a verdict for the plaintiff on that issue. Certain other issues were left to the jury, who found on them a verdict for the plaintiff for 5*l.* 10*s.*

Knowles, in Michaelmas term, 1850, obtained a rule nisi to enter a verdict for the plaintiffs on the issue joined on the plea of Non assumpsit.

Watson, for defendant. As the charter party was an executory contract, and expressed to be made by the plaintiff as agent for a principal, he is estopped from suing on it as principal. The case is the converse of *Humble v. Hunter* (12 Q.B. 310). So long as the contract continues executory, the defendant has a right to say that he contracted with some one different from G. Schmaltz & Co., and that he does not choose to contract with that firm; *Bickerton v. Burrell* (5 M. & S. 383). It may be of great consequence to one contracting party to know on whose undertaking he relies for fulfilment of the other part of an executory contract. Much may depend on skill, responsibility, character for fair dealing, and other matters personal to the contractor. The reason does not apply when the contract has been executed: and, accordingly, in such case the law is different; *Rayner v. Grote* (15 M. & W. 359). Here the mutual promises are not proved; for the plaintiff could not have been sued on this contract; *Jenkins v. Hutchinson* (13 Q.B. 744).

[PATTESON, J. The defendant there did not contract for himself. Here the evidence is that G. Schmaltz & Co. did in fact contract for the plaintiff as principal.]

* * * * *

PATTESON, J....It is conceded that, if there had been a third party who was the real freighter, such party might have sued, although his name was not disclosed in the charter party. But the question is, whether the plaintiff can fill both characters of agent and principal; or, rather, whether he can repudiate that of agent and adopt that of principal; both characters being referred to in the charter party, but the name of the principal not being therein mentioned. In *Bickerton v. Burrell*, the plaintiff, on the face of the contract, professed to enter into it as agent for C. Richardson. At the trial, C. Richardson was called to prove that her name was used without her knowledge. Lord Ellenborough nonsuited the plaintiff; a person who has exhibited himself as agent for another *whom he names* cannot at once throw off that character, and put himself forward as principal, without notice to the other party. By want of such notice, the defendant was placed in great difficulty, as he had contracted with Richardson and not with the plaintiff, and might have no means of conjecturing that she was not the real party. In the late case of *Rayner v. Grote*, the plaintiff contracted as agent for Johnson, but was in truth himself the principal. He sued the defendant for not accepting and

paying for goods. The defendant had accepted and paid for a great part of the goods sold, and knew, before he refused the residue, that the plaintiff was the real principal (so the case was distinguishable from *Bickerton v. Burrell* upon the very ground on which that decision proceeded); and the plaintiff was held to be entitled to sue. The case of *Humble v. Hunter* was an action by Grace Humble on a charter party signed by her son C. J. Humble, in which he was described as "owner of the good ship or vessel called the *Ann*." There the son proved that he executed as agent for the plaintiff; [but the Court held] that it was not competent for a third party to come in and claim to be the principal and so contradict the express statement of the contract itself. It was conceded that, if the words "owner of the good ship" had been omitted the plaintiff might have sued, on shewing that she was the real owner and that the son was her agent only; such evidence would not have contradicted the contract, but would have only let in a third party who was really interested, in conformity with the current of authorities in cases of contracts executed by agents in their own names¹. A distinction was taken, by the defendant's counsel, between an executed and an executory contract; and it was said that, whatever might be the rule in the former class of cases, where the defendant has received the benefit of the contract and it is probably immaterial to him whom he pays, yet that in the latter class the defendant cannot properly be held answerable to *B* having expressly contracted with *A*. And a passage in the judgment of the Court in *Rayner v. Grote* was much relied on: "If, indeed, the contract had been wholly unperformed, the question might admit of some doubt. In the case of contracts in which the skill or solvency of the person *who is named as the principal* may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then shew himself to be the real principal, and sue in his own name. And perhaps it may be fairly urged that this, in all executory contracts (if wholly unperformed, or if partly performed without the knowledge of who is the real principal), may be the general rule." With this passage we entirely agree. But it is plain that it is applicable only to cases where the supposed principal is named in the contract: if he be not named it is impossible that the other party can have been in any way induced to enter into the contract by any of the reasons suggested.

In the present case, the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have sued on this charter party. The defendant cannot have been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to inquire who he was. It is indeed possible that he may have been contented to take any freighter and principal provided it was not the

¹ [EDITOR'S NOTE. Yet this rule that an *undisclosed* principal, if he duly authorized his agent, can be "let in" to sue or be sued on the agent's contract, is—a Lord Davey said—"though well settled, an anomaly"; (L.R. [1901] A.C. at p. 256).

present plaintiff; and may have relied on the terms of the charter party indicating that the plaintiff was an agent only, being willing to accept of any one else, be he who he might, as principal. After all therefore the question is reduced to this: Whether we are to assume that the defendant did so rely on the character of the plaintiff as agent only, and would not have contracted with him as principal if he had known him so to be¹, and are to lay it down as a broad rule that a person contracting as agent for an unknown and unnamed principal is precluded from saying, I am myself that principal. Doubtless his saying so does in some measure contradict the written contract; especially the concluding clause which says: "This charter being concluded on behalf of another party" &c., for there was no such other party. It may be that the plaintiff entered into the charter party for some other party, who had not absolutely authorized him to do so, and afterwards declined taking it; or it may be that he intended originally to be the principal: in either case the charter party would be, strictly speaking, contradicted: yet the defendant does not appear to be prejudiced; for, as he was regardless who the real freighter was, it should seem that he trusted for his freight to his lien on the cargo. But there is no contradiction of the charter party if the plaintiff can be considered as filling two characters, namely those of agent and principal. A man cannot in strict propriety of speech be said to be agent to himself. Yet, in a contract of this description, we see no absurdity in saying that he might fill both characters; that he might contract as agent for the freighter whoever that freighter might turn out to be, and might still adopt that character of freighter himself if he chose.

There is nothing in the argument that the plaintiff's responsibility is expressly made to cease "as soon as the cargo is shipped"; for that limitation plainly applies only to his character as agent; and, being real principal, his responsibility would unquestionably continue *after* the cargo was shipped.

Rule absolute.

[EDITOR'S NOTE. The authority of this decision was reasserted in *Harper & Co. v. Vigers Bros.* (L.R. [1909] 2 K.B. 549) against some later cases that had been thought inconsistent with it. And it was held to apply even where the plaintiff was not himself the shipowner but had chartered another owner's ship to perform the contract of carriage; inserting the names of the defendants (freighters of the cargo) as charterers, signing "as agents for merchants," and informing defendants that this particular ship would perform the contract of carriage.]

¹ [EDITOR'S NOTE. Cf. *Tiedemann v. Ledermann* (L.R. [1899] 2 Q.B. 66), where a man, intending the sale to be really on his own account and for his own benefit, sold goods in the name of another, because he knew that the buyers would be unwilling to deal with himself as a principal. Suspecting him, the buyers afterwards repudiated the purchase. Six weeks later, he induced the nominal principal to ratify the contract. It was held that the ratification was not unreasonably late (see note to *Bolton v. Lambert*, *supra*, p. 325); and was valid although the agent had only a professed and not a sincere intention of contracting for the alleged principal, and was fraudulent. For it did not appear that the principal was a party to the fraud.]

ARMSTRONG v. STOKES.

QUEEN'S BENCH. 1872.

L.R. 7 Q.B. 598.

[Sale to Agent believed to be Principal.]

[MESSRS J. & O. RYDER & Co. were commission merchants carrying on business at Manchester, sometimes for themselves, and sometimes in pursuance of orders from constituents. They were not brokers professing never to act for themselves. The plaintiff, who was a merchant at Manchester, had had previous dealings with Ryder & Co., in the course of which it appeared that he had never inquired whether they had constituents or not. All former transactions had been duly settled between him and them, so that the question had never become material.

On June 15th, 1871, the plaintiff's salesman made a contract with J. & O. Ryder's salesman to sell to them 200 pieces of shirtings at 20s. 6d., to be paid for in thirty days after delivery, and then with a deduction of $1\frac{1}{2}$ per cent. from the nominal price. This was an ordinary mode of dealing, though the more usual terms in the Manchester market were cash, subject to a discount.

On July 24th the plaintiff sent the goods (which were grey, that is, unbleached shirtings) to Ryders, with an invoice debiting them with the price after deducting the discount, viz. 205*l*. The period of thirty days would elapse on August 23rd; but Ryders' pay-day being Friday, actual payment would not, had all gone right, have been made till August 25th. On the 24th the plaintiff received a memorandum from Ryders, requesting him to delay applying for payment till September 1st. Nevertheless, his salesman did call upon the 25th; but was refused payment, and told it would be all right on the next Friday. The plaintiff saw an announcement of the death of one of the partners in Ryders, and attributed the delay to this. He had done nothing, when, on August 30th, Ryder & Co. stopped payment. It was not pretended on either side that the plaintiff knew before the 30th of August that the defendants had anything to do with this transaction, so as to afford any evidence, on the one hand, that he had originally parted with the goods on the credit of the defendants, or, on the other hand, that he had elected to give credit to J. & O. Ryder to the exclusion of the defendants. But, after the stoppage of Ryders, on examining their books it was discovered that in this case they had been acting as commission merchants for the defendants. The plaintiff's case was, that, under the circumstances, he was entitled to demand payment from the defendants, as being undisclosed principals of Ryders in this transaction.

The evidence as to this was, that the defendants were merchants at Liverpool, who had often before given orders to Ryders, sometimes for grey and sometimes for white (that is, bleached) shirtings. When such an order had been previously given for white shirtings, the course of business had always been for Ryders to procure grey shirtings, and then to have those grey shirtings bleached; and, when they were bleached, to deliver them to the defendants, charging them with the cost of the

grey shirtings and of the bleaching, with one per cent. commission on that amount for placing the order, and also with any charges for packing, &c., and this amount the defendants always paid to Ryders. As the defendants knew that Ryders were neither manufacturers nor bleachers, they were, of course, aware that Ryders must have procured some one to supply the grey cloths and some one to bleach them. But they never were, in any of the previous transactions, brought into communication with those who supplied the goods or those who bleached them, nor did they ever inquire, nor were they ever told, who they were. There was no running account between the defendants and Ryders; the defendants almost invariably paid on each transaction. It was stated in the evidence that they generally, but not quite always, paid "in cash," that is, on the pay-day after the goods were delivered to them.

In the present case the defendants gave a verbal order to Ryders for bleached shirtings. Nothing was said as to the price, which was therefore left to the discretion and honesty of Ryders; and nothing was said as to the mode in which they were to be paid for, which was, therefore, to be as usual. In consequence of this order Ryders' manager agreed to make the above-mentioned agreement with the plaintiff's salesman.

When the shirtings were delivered to Ryders, they sent them to the bleacher, who, as usual, cut each piece in two; and having received 200 pieces of grey cloth, sent back 400 pieces of white cloth. Ryders sent these 400 pieces to the defendants, with an invoice dated August 2nd, headed as follows: "Invoice of ten packages of goods purchased and forwarded per carrier to Liverpool, by order and on account of Messrs Bates, Stokes, & Co. there" (the defendants) "by the undersigned," &c. The defendants were in this invoice charged with the actual money which ought to have been paid to the plaintiff as the price of the goods, viz. (a) 205*l.* less 1½ per cent. discount, (b) the actual charge of the bleaching, (c) one per cent. on the amount of those two sums as commission, and (d) the amount of some packing charges; making in all 227*l.* 10*s.* 9*d.*, noted as being due the 11th of August, which was the first pay-day after the goods would be received in Liverpool. On August 11th, the defendants, with perfect bonâ fides, paid Ryders that sum of 227*l.* 10*s.* 9*d.*

The plaintiff sued for the price of the shirtings; and recovered a verdict. The defendants appealed; urging (1) that there had been no contract between them and the plaintiff, and (2) that, even if there had been, the circumstances debarred him from recovering from them.]

BLACKBURN, J....Mr Herschell took three points. First, he said that the defendants were not undislosed principals, employing Ryders as agents with authority to create privity between the unknown persons who supplied the goods and the defendants. Secondly, that even if they were, the defendants, having, before the plaintiff heard of their connection with the matter and before they heard of the plaintiff, honestly and in the ordinary course of business paid Ryders, were no longer liable to the plaintiff. And thirdly, that the plaintiff had by laches disentitled himself to sue.

The third point taken was disposed of at once¹.

The first point depends on a question of fact, viz., what was the authority really given to J. & O. Ryder by the defendants? Where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal, but who was not. It has often been doubted [cf. p. 334 n.] whether it was originally right so to hold. But it now is established law that, if on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he...may recover the price himself direct from the principal; subject to an exception (which is not so well established as the rule, and is not very accurately defined), viz., that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor.

We have first to consider whether we should draw from the evidence the inference of fact that the defendants were principals; so that if the price had not been paid by the defendants to Ryders the plaintiff would have a right to be paid the money rather than look to the trustees of the estate of Ryders. This depends entirely on what was the real nature of the employment of Ryders by the defendants. The defendants not being known in the matter at all to the plaintiff, there can be no case against the defendants of holding out Ryders as having their authority to a person who did not know that Ryders had any principal at all. As to the real authority, there is evidence both ways. The charge for commission is conclusive to shew that, to some extent, there was a relation of principal and agent; the defendants were entitled to have the skill and diligence of Ryders to get the goods as cheaply as they could; and the defendants were entitled to have the true cost of the goods debited to them with no further addition than the charges and the commission. Then Ryders did not engage to supply the goods themselves; they only undertook to find persons who would. If prices had risen after the plaintiff made his bargain, and the plaintiff had refused to go on, the now defendants could not have sued Ryders for this; they must either have sued the now plaintiff, if there is privity between them, or perhaps have used the name of J. & O. Ryder, as their trustees, to sue, as is suggested by Kelly, C.B., in *Mollett v. Robinson* (L.R. 7 C.P. 119). In the invoice the defendants are not charged as purchasers from Ryders, but are debited for goods bought by their order and on their account. This form is also evidence in favour of the plaintiff. But none of these things are conclusive. The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a *foreign* constituent does not give the commission merchant any

¹ [EDITOR'S NOTE. The court had already said (p. 601): "We think that if the plaintiff had, on the non-payment by Ryders, any right to come on the defendants the taking no active step before the 30th was...not evidence of such laches as would deprive him of that right."]

authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. The inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton forwarded to him in consequence of his order given to a commission merchant at New Orleans (or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant), is so obvious that (in the absence of evidence of an express authority to that effect) the commission agent cannot pledge his foreign constituent's credit. Where the constituent is resident in England, the inconvenience is not so great; and we think that, *primâ facie*, the authority is given, unless there is enough to shew that it was not in fact given. It was strongly urged by the defendants' counsel, that the course of dealing and the mode of settlement by the defendants with Ryders were sufficient to shew that Ryders were not intended to have authority to establish privity of contract between the defendants and those from whom Ryders obtained the goods. We agree that it is evidence that way; but we do not feel justified in finding this question in favour of the defendants. If a special jury, who have knowledge of the course of business beyond what we have, had on this ground found a verdict for the defendants, we should not have been dissatisfied with it. (Indeed, we feel this so strongly that, if the event of the cause depended upon this point, we should probably have given the defendants liberty to have a new trial, on payment of costs, in order that the opinion of a jury might be taken. But it is not necessary to do this, as we have come to the conclusion that the defendants are entitled to the verdict on the second ground.)

It is right to say that the phrase repeatedly used by the counsel for the plaintiff that the vendor "has a right to follow the goods" is, in our opinion, calculated to mislead. In the absence of fraud, unless the person receiving the goods is a party to the contract under which the goods were sold, the vendor has no right to follow them. If the goods were bricks sold to a contractor the vendor could not charge the owner of the house into which they were built; though he might do so if the person supposed to be the contractor turned out to be really agent for the owner of the house. The principle is the same in such a case as the present.

The second point raised is of considerable importance....A broker always professes to make a contract between two principals. In every case, therefore, where the sale is to a broker, the vendor knows that there is or ought to be a principal between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker; and the principal also knows that the vendor is aware of this and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal.

In *Thomson v. Davenport* Lord Tenterden, in speaking of this subject, says (7 C.B. at p. 39): "I take it to be a general rule, that if a person sells goods supposing that at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third

person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; *subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.*" And Bayley, J., says: "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that *the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent.*"

But in *Heald v. Kenworthy* (10 Ex. 739) Parke, B., says: "I think that there is no authority for saying that a payment made to the agent precludes the seller from recovering from the principal; unless it appears that he [the seller] has induced the principal to believe that a settlement has been made with the agent." He states this as generally true wherever a principal has allowed himself to be made a party to a contract; and makes no exception as to the case where the other side made the contract with the agent believing him to be principal, and continued in such belief till after the payment was made. We think the counsel for the plaintiff were justified in arguing that Parke, B., thought the exception did not exist. And this is a weighty authority in favour of the plaintiff's contention; more especially as Pollock, C.B., and Alderson, B., appear entirely to assent to the judgment of Parke, B.

We think that we could not, without straining the evidence, hold in this case that the plaintiff had induced the defendants to believe that he (the plaintiff) had settled with J. & O. Ryder at the time when the defendants paid them. This makes it necessary to determine whether we agree in what we think was the opinion of Parke, B.

We think that, if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship. We find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule. And (without deciding anything as to the case of a broker¹, who avowedly acts for a principal though not necessarily named; and confining ourselves to the present case, which is one in which, to borrow Lord Tenterden's phrase, the plaintiff sold the goods to Ryder & Co., "supposing at the time of the contract he was dealing with a principal,") we think such an exception is established.

We express no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account; so as to give rise to

¹ [EDITOR'S NOTE. See *Irvine v. Watson*, *infra*, p. 341.]

a set-off or mutual credit between them. We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, bonâ fide and without moral blame, paid Ryders at a time when the plaintiff still gave credit to Ryders and knew of no one else. We think that, after that, it was too late for the plaintiff to come upon the defendants.

Verdict entered for defendants.

[EDITOR'S NOTE. As to the correct interpretation of this difficult decision, see the case now following.]

IRVINE v. WATSON.

COURT OF APPEAL. 1880.

5 Q.B.D. 414.

[Sale for Principal, whose identity is undisclosed.]

[THE plaintiffs sold certain casks of oil; and on the face of the contract of sale one John Conning appeared as the purchaser. But the plaintiffs knew that he was only an agent buying for principals, for he told them so at the time of the sale; therefore they knew that they had a right against somebody besides Conning. On the other hand, the defendants knew that somebody or other had a remedy against them, for they had authorized Conning (who was an ordinary broker) to pledge their credit; and the invoice specified the goods to have been bought "per John Conning." Then the defendants paid the broker. An action was brought to recover the price of the oil.

Bowen, J., gave judgment for the plaintiffs. The defendants appealed].

Gully, Q.C., for the defendants. First, assuming that the rule laid down by Parke, B., in *Heald v. Kenworthy* [*vide* p. 340 *supra*] is correct, and that it is necessary to shew that the payment to the broker was the result of some misleading conduct on the part of the sellers, that was the case here. For the contract was for "cash on or before delivery," and the defendants, therefore, had a right to suppose that the plaintiffs would not part with the possession of the goods without getting the money. The parting with possession would, as between business men, amount to a representation by the plaintiffs that the broker had already paid them. Secondly, the defendants contend that *Heald v. Kenworthy* has been substantially overruled in *Armstrong v. Stokes* (*supra*, p. 336). This case decides that payment to the broker, at a time when the seller still gives credit to the broker, discharges the buyer; and here the plaintiffs still gave credit to Conning at the time when the defendants paid him....

BRAMWELL, L.J....It is impossible to say that a payment to the broker discharged the defendants from liability to the plaintiffs; unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs, and they made such payment in consequence of such belief. But it is contended that the plaintiffs did mislead the defendants into such belief, by parting with the possession of the oil to Conning without getting the money. The terms of the contract were "cash on or before delivery," and it is said that the defendants had a right to suppose that the sellers would

not deliver unless they received payment of the price at the time of delivery. I do not think that that is a correct view. The plaintiffs had a perfect right to part with the oil to the broker without insisting strictly upon their right to prepayment, and there is nothing in the facts of the case to justify the defendants in believing that they would so insist. No doubt if there was an invariable custom in the trade to insist on prepayment where the terms of the contract entitled the seller to it, that might alter the matter; and in such case non-insistence on prepayment might discharge the buyer if he paid the broker on the faith of the seller already having been paid. But that is not the case here; the evidence shews that there is no invariable custom to that effect¹.

I think that in *Thomson v. Davenport* (*supra*, p. 339) the judges did not intend a literal interpretation to be put on their words. Whether they did or no, the opinion of Parke, B., in *Heald v. Kenworthy* seems to me preferable; it is that "If the conduct of the seller would make it unjust for him to call upon the buyer for the money (as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter), or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal."

But the defendants rely on the case of *Armstrong v. Stokes*. Now that remarkable case seems to have turned in some measure upon the peculiar character filled by Messrs Ryder as commission merchants. The Court seem to have thought it would be unreasonable to hold that Messrs Ryder had not authority to receive the money. I think upon the facts of that case that the agents would have been entitled to maintain an action for the money against the defendant; for, as commission merchants, they were not mere agents of the buyer. Moreover the present is a case, which Blackburn, J., there expressly declines to decide. He expressly draws a distinction between a case in which (as in *Armstrong v. Stokes*), the seller at the time of the sale supposes the agent to be himself a principal, and gives credit to him alone, and one in which (as here) he knows that the person with whom he is dealing has a principal behind, though he does not know who that principal is.

It is to my mind certainly difficult to see how the mere fact of the vendor knowing or not knowing that the agent has a principal behind can affect the liability of that principal. I should certainly have thought that his liability would depend on what he himself knew; that is to say whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default. But it is sufficient here that the defendants did know that the sellers had a claim against them, unless the broker had already paid for the goods.

¹ [EDITOR'S NOTE. "In *very special* circumstances, mere delay [on the part of the plaintiff] may amount to a misrepresentation [that plaintiff has been paid]. It may be conduct misleading the defendant. But that can only be where there is something in the original contract, or in the conduct of the parties, which renders the delay misleading. The creditor is not obliged to apply to all his debtors." *Per* Bowen, L.J., in *Davison v. Donaldson* (L.R. 9 Q.B.D. 623).]

It is unnecessary to consider the question further, as to whether a payment on a general running account, as distinguished from a payment specifically appropriated to the particular purchase, would be sufficient to bring the case within Lord Tenterden's qualification of the general rule.

BAGGALLAY, L.J....If the dicta in *Thomson v. Davenport* are to be taken as strictly correct, they certainly go a long way to support the defendants' contention. But they were mere dicta. Their largeness has since been dissented from by Parke, B., in the case of *Heald v. Kenworthy*, and with his dissent I entirely agree. He limits the qualification of the general rule to cases in which the seller by some conduct has misled the buyer into believing that a settlement has been made [by the seller] with the agent¹. If that limitation is correct, I am of opinion that there is no such payment here as would discharge the defendants.

Armstrong v. Stokes must be accepted with reference to the particular circumstances of that case. There, at the time of the payment by the principal to the brokers, the sellers still gave credit to the brokers and to the brokers alone. But that is not the case here; the plaintiffs it is true gave credit to Conning, but they did not give him exclusive credit.

BRETT, L.J....The limitation put by Parke, B., on the earlier wide qualification was correct. But it is suggested that that limitation was overruled in *Armstrong v. Stokes*. I think, however, that the Court there did not intend to overrule it, but to treat the case before them as one to which the limitation did not apply. They noticed the peculiar character of Manchester commission merchants. Probably their decision means this, that, when the seller deals with the agent as sole principal, and the nature of the agent's business is such that the buyer ought to believe that the seller has so dealt, in such a case it would be unjust to allow the seller to recover from the principal after he paid the agent....

Appeal dismissed.

CALDER v. DOBELL.

EXCHEQUER CHAMBER. 1871.

L.R. 6 C.P. 486.

[*Contract with Agent for disclosed Principal—Election.*]

THE plaintiffs were cotton-brokers in Liverpool trading under the name of Wright & Co. The defendant was a merchant there. In January, 1870, one Cherry, a broker, proposed to the defendant to buy cotton "to arrive." The defendant consented to buy 100 bales, but declined to allow his name to appear in the transaction. Cherry thereupon offered to buy of the plaintiffs 100 bales, but they refused to trust him, and Cherry, being pressed, disclosed the name of the defendant as his principal. A contract was then entered into between the plaintiffs and Cherry for the sale of 100 bales at a given price, and a sold-note was sent by the

¹ [EDITOR'S NOTE. In the later case of *Darison v. Donaldson* (L.R. 9 Q.B.D. 623) Jessel, M.R., adopted this limitation; he says "There must be a change of position between the principal and agent, caused by the conduct of the seller."]

plaintiffs to Cherry—"Mr P. Cherry. We have this day sold to you 100 bales cotton," &c., &c., and a bought-note was sent by Cherry to the plaintiffs—"I have this day bought of you 100 bales cotton," &c., &c. Cherry at the same time sent the defendant an advice-note, as follows: "I have this day bought for you from Wright & Co. 100 bales cotton," &c. This note was kept by the defendant till the month of August. An invoice was sent by the plaintiffs to Cherry charging him as the buyer of the cotton, and Cherry was debited for it in the plaintiffs' books, and, after the arrival of the cotton, he was repeatedly applied to to accept and pay for it, both by the plaintiffs and by their attorneys. Failing to obtain payment from him, and the market falling, the plaintiffs sold the cotton and sued the defendant for the difference between the price at which the cotton was sold and the market-price at the time of the breach.

The learned judge left the following questions to the jury: (1) Did the defendant authorize Cherry to make the contract for him? (2) Did Cherry assume to make the contract for the defendant, and did the defendant, knowing this, ratify his act? (3) Did the plaintiffs, knowing that Cherry was acting as agent for the defendant, elect to contract with Cherry as principal, upon the terms of giving credit to him and him alone?

The jury answered the first and second questions in the affirmative, and the third in the negative, and a verdict was thereupon entered for the plaintiffs for 530*l.*, leave being reserved to the defendant to move to enter a verdict for him or a nonsuit, if, assuming the facts found by the jury to be true, they could not properly be given in evidence, having regard to the written contract; or if, having regard to the whole evidence, the learned judge ought to have directed the jury, as matter of law, to find for the defendant.

Holker, Q.C. Dobell's name having been disclosed at the time, it was not competent to the plaintiffs to say they contracted with him, and not with Cherry. Where the name of the principal is not disclosed, parol evidence is admissible to shew that there was a principal. But, where the principal is known at the time, and the seller chooses to contract with the agent in his own name only, to allow the seller to say that he contracted with the principal, and not with the agent, would be to admit parol evidence to contradict the written contract.

[BOVILL, C.J. Have you any authority to support that distinction?]

There is no distinct authority upon the subject; but it is submitted that it must be so in principle.

[MONTAGUE SMITH, J. It is opposed to the doctrine of Parke, B., in *Higgins v. Senior* (8 M. & W. 834).]

The insertion of the agent's name in the contract, the principal being known at the time, was a conclusive election on the sellers' part to look to the agent only; and the learned judge ought to have so directed the jury, as matter of law....In *Thomson v. Davenport* (9 B. & C. 78), Lord Tenterden says...."If at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with

him and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." If this were not so, it would be to make two persons severally liable upon the same contract at the same time, which the law does not allow: *Priestly v. Fernie* (3 H. & C. 977). The seller is bound to make his election at the time: *Smethurst v. Mitchell* (1 E. & E. 623). Knowing the name of the principal at the time, and having chosen so to act as to make the agent alone responsible, the plaintiffs conclusively made their election to charge Cherry; and the learned judge should have so directed the jury. At all events, they should have been told that, if the plaintiffs intended to hold the principal liable, they should have manifested their intention within a reasonable time.

[WILLES, J. This last point does not appear to have been raised at the trial.]

The verdict was clearly against the weight of evidence.

BOVILL, C.J. The first...question is whether parol evidence was admissible to shew that the contract was made on behalf of the defendant as principal. Now, the written contract was made with Cherry in his own name; and it is contended that, the defendant's name having been disclosed at the time, the defendant cannot be sued; in other words, that parol evidence was not admissible to shew that the defendant was the real principal. It has for many years been a generally received impression that, where a broker makes a contract for an undisclosed principal, the latter may sue upon it, and equally that, when discovered, he may be made responsible for its performance. There can be no doubt that the defendant might have sued upon the contract so made by Cherry; and I am equally of opinion that he may be made responsible, provided the parol evidence was admissible to shew that he was the real principal. The rule is clearly laid down by Parke, B., in *Higgins v. Senior*, in the following terms: "There is no doubt that, where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to and charge with liability on the other the unnamed principals" (unnamed principals there meaning principals not named in the contract itself), "and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom on the face of it it purports to bind; but shews that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal."...It is true that the agent may be personally charged; and that where he has given his signature to the contract, he is estopped from saying that he did not contract personally. That, however, is a very different thing from saying that the real principal when discovered cannot sue or be sued. The suppression of the principal's name is entirely consistent with the practice of many trades, to conceal transactions of speculation. The effect is that if the broker enters into contracts in his own name, and

has a principal, those whom he contracts with will have the responsibility both of the principal and of the broker. There is nothing inconsistent in thus giving an option to hold either responsible. I am of opinion that, in accordance with all the authorities, the parol evidence was admissible.

As to the next point it seems to me to be impossible to say, as matter of law, that the learned judge was bound to direct the jury to find for the defendant. There was evidence which could not have been withdrawn from the jury. I am, therefore, of opinion that that ground for the motion fails.

It is said that the plaintiffs had elected to treat Cherry as the principal. It is contended that the very fact of the plaintiffs' entering into the contract with Cherry was evidence of election. But, if the parol evidence was admissible, that argument fails. Election must be a matter of fact; and it appears that, at the time of entering into the contract, the plaintiffs expressly refused to trust Cherry. The next ground of alleged election was the demand of payment made on the broker. That, however, was an equivocal act. If the plaintiffs have got the responsibility of a principal, the demands made upon the agent may have been made upon him on behalf of his principal. There are many trades in which the practice prevails of referring to the brokers alone; and it is a very convenient practice. Where shipping documents have to be tendered, they are almost invariably sent to the brokers for that purpose. I think the evidence relied on to shew an election was extremely slight, especially where the only action brought was brought against the principal. It was clearly for the jury, and the learned judge would not have been justified in withdrawing it from them....

Then it was said that there was no evidence of authority in Cherry to make the contract in the form in which he made it. That rests entirely upon the evidence of the defendant himself; Cherry was not called. It was proved that advice was sent by Cherry to the defendant of a contract with Messrs Wright & Co. for 100 bales of cotton, and there was also evidence that Cherry had authority to make that contract, and evidence of ratification by the defendant; and the jury found that the defendant did authorize and did ratify the contract so made, and my Brother Brett is not dissatisfied with that finding. It was further objected that the learned judge was wrong in leaving it to the jury to say whether the plaintiffs elected to treat Cherry as principal, and to give credit to him, and him only. That, however, was in favour of the defendant. I think it was not, as matter of law, a contract made with Cherry alone, and that the jury were well warranted in finding as they did.

It was further contended that my Brother Brett should have told the jury that the plaintiffs were bound to make their election at once, or, at all events, in a reasonable time. That point was not, and could not have been, raised at the trial. For the purpose of this question all the rest must have been assumed against the defendant. I further think that there is no ground for saying that the verdict was against the weight of evidence.

WILLES, J....I do not agree with Mr Holker that two persons cannot

be severally liable on the same contract....There is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time, with the additional advantage of knowing the principal's name at the time. The very object of the plaintiffs' insisting upon being informed of the name of the principal was to make him liable; and Cherry's name was inserted in the contract for the purpose of enabling them to charge him, at their option. To hold that asking the name of the principal at the time is to discharge the principal, would seem to me to be contrary to common sense....But for the law laid down in *Higgins v. Senior*, only Dobell, the principal, would have been liable here; and that case only goes to superadd the liability of the agent, and not to detract from the liability of the principal. Apart from the written contract, the principal only would have been liable; and the clear effect of the writing was only to superadd the liability of Cherry, the agent.

MONTAGUE SMITH, J....Parol evidence to shew that Cherry was contracting for a principal is admissible on this principle, viz. that, for the purpose of that contract, the principal has allowed the agent to sign it in his own name in the place of himself. Evidence is not admissible to shew that the person who appears on the face of the instrument to be personally a contracting party is not such; it would be to allow parol evidence to contradict the written agreement, which cannot be done. That distinction is now well established; and, although technical, it appears to consist with the practical business habits of mankind. Whether strictly logical or not, it is recognised by the law....

BRETT, J....There was abundant evidence that Cherry did make the contract with the authority of the defendant, and that he did ratify it; for, the advice-note being sent to him, he kept it for five months without objection.

Rule refused.

Against this judgment an appeal was brought in the Exchequer Chamber.

KELLY, C.B. I think this case is free from difficulty. The contract was made in the name of Cherry, the agent: but the case shews that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal, at their election. No doubt, the election being once determined, there is an end of the matter; as where the agent has been sued to judgment. Here, however, nothing was done to determine the election at the time this action was brought against the principal. The question was, I think, properly left to the jury, and upon proper evidence; and the verdict was quite right.

* * * * *

Judgment affirmed.

COOKE v. ESHELBY.

HOUSE OF LORDS. 1887.

L.R. 12 APP. CA. 271.

[Undisclosed Principal—Set-off of debt due from Agent.]

IN April and June, 1883, Livesey Sons & Co., cotton brokers at Liverpool, sold to Isaac Cooke & Sons, on the Liverpool Cotton Market, cotton for future deliveries. Livesey Sons & Co. made these two contracts in their own names, but were really acting as agents for Maximos, their undisclosed principal. The result of this transaction was that a sum of £680 was due from Isaac Cooke & Sons to Livesey Sons & Co. For this sum an action was brought against Isaac Cooke & Sons by Eshelby as trustee in the liquidation of Maximos who had failed. The defendants by their defence claimed to set off against the plaintiff's claim money due from Livesey Sons & Co. to the defendants upon a general account. In answer to the plaintiff's interrogatories whether in the transactions sued on the defendants did not believe that Livesey & Co. were acting as brokers on behalf of principals the defendants said: "We had no belief on the subject. We dealt with Livesey & Co. as principals, not knowing whether they were acting as brokers on behalf of principals, or on their own account as the principals."

At the trial at Liverpool in February, 1884, before Baggallay, L.J., without a jury, it was proved that Livesey & Co. bought and sold both for principals and on their own account, and that Cooke & Sons knew this. Baggallay, L.J. held that the defendants were entitled to the set-off and gave judgment for them.

The Court of Appeal (Brett, M.R., Lindley and Bowen, L.JJ.) reversed this decision and entered judgment for the plaintiff; on the ground that the defendants were not entitled to the set-off unless they had been induced by the conduct of Maximos the principal to believe, and did in fact believe, that they were dealing with Livesey & Co. as the principals.

Against this decision the defendants appealed.

Kennedy, Q.C., for the appellants....Livesey & Co. were undoubtedly principals on the face of the contract: there was nothing to suggest that they were acting as agents. In so contracting they were acting under the express instructions of their principal, Maximos, that his name should not be given. Treating Livesey & Co. as principals the defendants balanced their contract book accordingly and set off the gains against the losses upon all contracts, whether of sale or purchase, with Livesey & Co. If Maximos had been named the defendants would have had nothing to do with a contract in which he was the principal, not altogether because they were unwilling to take his name, but because it might destroy their chance of set-off with Livesey & Co. The defendants claim the right of set-off, not on the ground of estoppel, but on the ground of an equitable qualification on the right of the undisclosed principal to adopt the contract, the qualification being that he cannot prevent the right of set-off if he instructs or allows his agent to contract as principal. To establish such a right it is not necessary to have a representation that

the contracting party is the person solely interested: all that is necessary is a representation and belief that the buyer is entitled to deal with him as the principal. Once the authority is shewn by the principal to the agent to contract as principal, he may be safely treated as principal. The basis of the right to set-off is not belief or representation but authority. It is a mistake to suppose that in the factors' cases or any cases any representation is ever made that no one but the seller is interested.

Where a contract not under a seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue: but if the principal sues "the defendant is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party": *Sims v. Bond* (5 B. & Ad 389, 393). The defendant "is entitled to the same defence whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal": *Isberg v. Bowden* (8 Ex. 852). It is not necessary to negative means of knowledge that the agent dealt as agent. Nor is it necessary to shew belief in the defendant that the agent was acting on his own account. It is enough to shew that the defendant had not the means of knowing, and did not know, that the agent was not acting on his own account: *Semenza v. Brinsley* (18 C.B. N.S. 467). If the principal instructs or allows the agent to deal in his own name he can only sue subject to the right of set-off: *Browning v. Provincial Insurance Company* (L.R. 5 P.C. 263); *Maspons v. Mildred* (L.R. 8 A.C. 874).

Broadly, the principal's right to adopt the contract of his agent is subject to this, that he must in all respects stand in the shoes of his agent. It is a mistake to treat the factors' cases as if they were decided on the ground of estoppel. Secret instructions to the agent not to sell in his own name do not prevent the right to set-off: *Ex parte Dixon* (L.R. 4 Ch. D. 133). To create estoppel there must be not only belief in a fact but representation of that fact. The only representation a factor makes is that he has authority to sell and convey a good title to the goods. The rule as to an undisclosed buyer is independent of estoppel: *Armstrong v. Stokes* (L.R. 7 Q.B. 607).

LORD HALSBURY, L.C. In this case a merchant in Liverpool effected two sales through his brokers. The brokers effected the sales in their own names. The appellants, the merchants with whom these contracts were made, knew the brokers to be brokers, and that it was their practice to sell in their own names in transactions in which they were acting only as brokers. They also knew that the brokers were in the habit of buying and selling for themselves. The appellants with commendable candour admit that they are unable to say that they believed the brokers to be principals; they knew they might be either one or the other; they say that they dealt with the brokers as principals, but at the same time they admit that they had no belief one way or the other whether they were dealing with principals or brokers.

The principle upon which this case must be decided has been long established. The ground upon which all the cases have been decided is, that the agent has been permitted by the principal to hold himself out

as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief.

In *Baring v. Corrie* (2 B. & Ald. 137), Lord Tenterden had before him a very similar case, and although in that case the Court had to infer what we have here proved by the candid admission of the party, the principle is precisely that which appears to me to govern this case. Lord Tenterden says of the persons who in that case were insisting that they had a right to treat the brokers as principals: "They knew that Coles & Co. acted both as brokers and merchants. If they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not. But they made no inquiry." And Bayley, J., says: "When Coles & Co. stood at least in an equivocal situation, the defendants ought in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed, when they bought the goods, that Coles & Co. sold them on their own account. And if so, they can have no defence to the present action."

I am therefore of opinion that the judgment of the Court of Appeal was right. The selling in his own name by a broker is only one fact, and by no means a conclusive fact, from which, in the absence of other circumstances, it might be inferred that he was selling his own goods. Upon the facts proved or admitted in this case the fact of selling in the broker's name was neither calculated to induce nor did in fact induce that belief.

LORD WATSON....A sale by a broker in his own name to persons having knowledge [of the Liverpool cotton market], does not convey to them an assurance that he is selling on his own account; on the contrary it is equivalent to an express intimation that the cotton is either his own property or the property of a principal who has employed him as an agent to sell. A purchaser who is content to buy on these terms cannot, when the real principal comes forward, allege that the broker sold the cotton as his own. If the intending purchaser desires to deal with the broker as a principal and not as an agent in order to secure a right to set-off, he is put upon his inquiry. Should the broker refuse to state whether he is acting for himself or for a principal, the buyer may decline to enter into the transaction. If he chooses to purchase without inquiry or notwithstanding the broker's refusal to give information, he does so with notice that there may be a principal for whom the broker is acting as agent. Should that ultimately prove to be the fact, he has, in my opinion, no right to set off his indebtedness to the principal against debts owing to him by the agent.

It was argued for the appellants that in all cases where a broker, having authority to that effect, sells in his own name for an undisclosed principal, the purchaser, at the time when the principal is disclosed, is entitled to be placed in the same position as if the agent had contracted on his own account....If the argument were well founded the appellants would be entitled to prevail in this appeal; because in that case their

right of set-off had arisen before the 20th of July, 1883, when they first had notice that Maximos was the principal....But *Semenza v. Brinsley* (18 C.B. N.S. 467) and *Borries v. Imperial Ottoman Bank* (L.R. 9 C.P. 38), appear to me to establish conclusively that, in order to sustain the defence pleaded by the appellants, it is not enough to shew that the agent sold in his own name. It must be shewn that he sold the goods as his own; or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account and not for an undisclosed principal. And it must also be shewn that the agent was enabled to appear as the real contracting party by the conduct, or by the authority, express or implied, of the principal. The rule thus explained is just; and rests upon the doctrine of estoppel. It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.

A broker who effects a sale in his own name with an intimation, express or implied, that he is possibly selling as an agent, does not sell the goods as his own, and in such a case the purchaser has no reasonable grounds for believing that the agent is the real party with whom he has contracted.

LORD FITZGERALD....I concur in adopting the decision and the reasons of the Court of Appeal. I have, however, some hesitation in accepting the view that the decisions rest on the doctrine of estoppel. Estoppel in pais involves considerations not necessarily applicable to the case before us. There is some danger in professing to state the principle on which a line of decisions rests; it seems to me to be sufficient to say in the present case that Maximos did not in any way wilfully or otherwise mislead the defendants (*Cooke & Sons*), or induce them to believe that *Livesey & Co.* were the owners of the goods or authorized to sell them as their own, or practise any imposition on them. The defendants were not in any way misled.

Appeal dismissed.

[EDITOR'S NOTE. See *Borries v. Imperial Ottoman Bank* (L.R. 9 C.P. 38) that to have the means of knowing a man to be acting only as agent has not in itself the same effect as actual knowledge: for such a doctrine would create an intolerably burdensome duty of inquiry. But it is of course evidence from which a jury may infer knowledge.]

CHAPTER VIII

DISCHARGE

SECTION I

BY OPERATION OF CONDITION SUBSEQUENT

PARKER v. IBBETSON.

COMMON PLEAS. 1858.

4 C.B. N.S. 346.

[*Discharge under Custom.*]

THE defendant, who was a woollen-merchant at Leeds, having a place of business in London, engaged the plaintiff to serve him in the capacity of agent or representative there, upon the following memorandum:

"Memorandum of agreement made between Henry Ibbetson & Co., of Leeds, of the first part, and R. A. Parker, of &c., of the second part: The aforesaid R. A. Parker engages to serve the said Henry Ibbetson & Co. as agent or representative, at the salary of 150*l.* per annum in consideration thereof. *Also provided at the end of the year the said H. Ibbetson & Co. find the said R. A. Parker has done sufficient business to justify them in recompensing by making up his salary to 180*l.*, to do so, being a donation of 30*l.*, to his present stipulated amount of 150*l.**"

The plaintiff continued in the service of the defendant under this agreement until the 1st of August (receiving his salary monthly), when the defendant gave him a month's notice to quit. For this dismissal, which the plaintiff contended was wrongful, and in contravention of the agreement, the action was brought. By the defendant, several witnesses were called to prove a custom in the particular trade to dismiss at a month's notice, though the engagement was at a yearly salary: and it was proved that one house of great eminence adopted a form of hiring to exclude the custom for a month's notice. But some of the witnesses, on cross-examination, said they had never known an instance of a clerk having been dismissed, at a month's notice, where the agreement stipulated for a bonus for good conduct at the end of the year....

The jury found—first, that the custom was proved; secondly, that the hiring was a special hiring, to which the custom did not apply; and thereupon they found for the plaintiff, damages 70*l.* The defendant appealed; on the ground that, the jury having found the fact of the existence of the custom, their finding as to the special terms of the contract was immaterial; and on the ground of misdirection, inasmuch as the construction of the contract was for the court.

Pigott, Serjt., for plaintiff. The jury have negatived the application of the custom proved to the particular contract.

[CROWDER, J. What more is this than a contract of hiring for a year, with a promise of a gratuity, under certain conditions, at the end of it?]

The agreement contemplates that the relation of master and servant shall endure at all events until the end of the year; no exposition can be admitted to contradict or vary its terms. In *Spartali v. Benecke* (10 C.B. 212), Wilde, C.J., says: "The peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract, must not vary or contradict, expressly or by implication, the terms of the written contract." The proviso shews that they contemplated that the contract should not be put an end to until the expiration of the year.

[BYLES, J. It shews rather that they contemplated the *probability* of its continuance until the end of the year.]

In *The King v. Droitwich* Lord Ellenborough says: "I take the rule of law to be, that, if no particular time is expressed for the continuance of the service, or is reasonably to be implied, a hiring for a year is to be intended"; (3 M. & S. 243). All the witnesses who were interrogated negatived the application of the custom (for a month's notice) to the case of an agreement with the special stipulation contained in the agreement in this case. If this be a question for the jury, they have decided it for the plaintiff.

CROWTHER, J....There is a general custom in the trade that a yearly hiring may be put an end to by either party upon a month's notice. It is insisted on the part of the plaintiff, that the special terms of this agreement exclude the application of it to this case. There is no foundation for that argument. The first part of the contract amounts simply to an engagement on the part of the plaintiff to serve the defendant as agent at the salary of 150*l.* per annum: then follows a proviso, that if, "at the end of the year the defendants find the plaintiff has done sufficient business to justify them in recompensing by making up his salary to 180*l.*, to do so." It seems to me simply an agreement for a yearly hiring at a yearly salary; and there is nothing in the proviso to alter the nature of the agreement: it is a mere statement that the defendant will at the end of the year, if he shall see fit, make the plaintiff a present of 30*l.* It is clear that this 30*l.* could not have been recovered by action, if the service had lasted until the end of the year. Looking at the custom proved, which is general, is there anything in the written agreement to exclude it? The proviso cannot exclude it: that has no reference to dismissal. Then, if there is nothing in the contract that is inconsistent with the application of the general custom, it is the same as if the custom had formed part of the written agreement. This case must follow the ordinary rule, that, wherever a contract is made in a particular trade, all customs which regulate that trade are tacitly incorporated into the contract, unless by express terms excluded.

WILLES, J....The evidence does not in fact negative the application of the custom to a hiring under a contract like this. The witness merely stated that he did not know of an instance where under such an agreement as the present the custom had been acted upon.

BYLES, J....The evidence of the custom was irresistibly strong; and, although the jury might, upon proper evidence, have found a limited custom, there was no evidence of any such limitation here.

New trial ordered.

HEAD v. TATTERSALL.

EXCHEQUER. 1871.

L.R. 7 Ex. 7.

[Warranty—Agreement for Right of Return.]

THE plaintiff, on Monday, March 13th, 1871, bought of the defendant (an auctioneer) for 43*l.* 1*s.* a horse, described in the catalogue as having been hunted with the Bicester and Duke of Grafton's hounds. The contract of sale contained a condition that "Horses not answering the description must be returned before 5 o'clock on Wednesday evening next; otherwise the purchaser shall be obliged to keep the lot with all faults."

After the sale the plaintiff learnt from the groom under whose charge the horse had been, but who was not a servant of the defendant, that it had not, in fact, been hunted with the Bicester and Duke of Grafton's hounds. This information was correct. As, however, he did not buy the animal for hunting purposes, he took it away for trial the same afternoon. On the road from the defendant's premises to the plaintiff's stables, and whilst under the care of the plaintiff's servant, it took fright and seriously injured itself by running against a carriage. The plaintiff returned the horse before 5 o'clock on the Wednesday evening as not corresponding to the description; and brought this action for the price he had paid. It was not disputed that the warranty was a mistake, but it was contended that under the circumstances the plaintiff had no right to return the horse. The jury found that the plaintiff was induced by the warranty to buy the horse; and that the injury sustained by the horse was not caused through any default of the plaintiff's servant. A verdict was thereupon entered for the plaintiff for 43*l.* 1*s.*

A rule was afterwards obtained to enter a verdict for the defendant, on the ground that the sale of the horse was not under the warranty, and that it could not be returned in the same condition as at the time of the sale; or to reduce the verdict on the ground that the plaintiff was only entitled to nominal damages....

H. James, Q.C., for defendant. The plaintiff, by removing the horse after the conversation with the groom, elected to treat the contract as binding, in spite of the mistake in the catalogue. Even if this be not so, the plaintiff was deprived of his right of return by the fact of the horse being injured whilst in his possession; if returned at all, the horse should have been returned in the same condition as when sold. The injury might have caused the horse's death, when the plaintiff would certainly have been confined to an action on the warranty. A contract cannot be rescinded unless the parties to it can be replaced in statu quo: *Curtis v. Hannay* (3 Esp. 82); *Clarke v. Dickson* (E. B. & E. 148). *Bannerman v. White* (10 C.B. N.S. 844) is not in point; there the goods were repudiated before receipt.

KELLY, C.B....Two objections are raised to the plaintiff's right of return. First, it is said that he had notice, before he removed the horse from the defendant's premises, that the warranty had not been complied with. There is evidence that he had learnt, before removing the animal,

that it had never been hunted with the Bicester hounds. I do not think, however, that this bound him to return it immediately. Under his contract he had till the Wednesday evening to make further inquiries (if he thought fit) as to the truth of what he had heard, and to come to a final decision. Then, secondly, it is said that, assuming his right to return remained, he could only exercise it if the horse continued in the same condition as at the time of sale; and that, inasmuch as the horse was injured between that time and the Wednesday, the right was lost. Several cases establish the unquestionable proposition that, as a general rule, no contract can be rescinded unless the parties can be replaced exactly in their original position. But these cases do not apply to a contract expressly stipulating for a right of return for a certain time, on specified grounds. The case of *Curtis v. Hannay* really has no application here. It only decides that, in a particular state of circumstances, a plaintiff may disentitle himself by his conduct from returning a specific chattel. There the plaintiff kept the horse which he had bought, and tried to cure it of the disease from which it was suffering; and so lost the right of returning it. Indeed the injury to the horse, which took place in that case, may well have resulted from the course of treatment which was adopted. Now, in the present case, it is true that the horse was injured whilst under the plaintiff's control; but not by his default, as the jury have expressly found. In my opinion, therefore, he did not thereby lose his right of returning it, any more than if it had been attacked in the stable with some complaint which greatly lessened its value, but for the existence of which the plaintiff was not responsible.

BRAMWELL, B.... Suppose the horse had already been in the plaintiff's stable when he received the notice, he would undoubtedly still have had till the Wednesday evening to consider what he would do. The fact that the notice (such as it was) preceded the actual removal, seems to me to make no difference.

Then it is said that a buyer cannot return a specific chattel except it be in the same state as when it was bought. But the rule must be qualified thus: The buyer must return the horse in the same condition as when he bought it, but subject to any of those incidents to which the horse may be liable from its inherent nature, or in the course of the exercise by the buyer of his rights over it. For example, suppose the horse, while standing in the stable, strained itself or injured a limb, that would not affect the right of return, although the horse would no longer be exactly in the same condition as before. A contrary rule would often produce singular results; a buyer might find himself deprived of his right to return a horse in consequence of any trifling hurt it might have suffered—perhaps not causing a difference of five shillings in its value—while in the buyer's possession....

Where a buyer, who has bought a horse not warranted to jump, tries it at jumping, and so injures it, his right of return would be gone, because the accident would be his own fault. He would not be trying the horse by virtue of any right given to him under his agreement. If, however, the injury were caused by reason of a trial necessary to test the warranty, then the right would remain. The case of a horse dying

was also put to us. But there, if the death occurs through some natural disease, or without the purchaser's default, is he to be without a remedy? I am disposed to think that even in such a case the contract might still be rescinded; just as I think it could be if the horse sold were to be left at the vendor's, by his permission, after the sale and were to die there.

CLEASBY, B.... Damage from the depreciation of a chattel ought to fall on the person who is the owner of it. Here the effect of the contract was to vest the property in the buyer; subject to a right of rescission in a particular event, when it would revert in the seller. In such a case the person who is eventually entitled to the property in the chattel ought to bear any depreciation in its value, caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is re-vested, and he must therefore bear the loss....

Rule discharged.

[EDITOR'S NOTE. In *Chapman v. Withers* (L.R. 20 Q.B.D. 824) a horse was sold with a warranty that it was "quiet to ride," but with a condition that any return for breach of warranty was to be made not later than the second day after the sale. On that day, notice was sent that the horse was *not* quiet to ride, but could not be returned at once, as it had broken its shoulder. The plaintiff was held not to be barred from suing on the warranty. Mathew, J., said: "The horse was to be returned for the purpose of trial; and for that purpose only. This horse could have been returned only in a state in which no trial would have been of any use. Its existence as a horse which could be ridden had ceased. And, with that, the obligation to return it had ceased." The student must remember that the right to return a chattel, for a mere breach of warranty, can arise only under an express agreement creating it.]

NUGENT v. SMITH.

COURT OF APPEAL. 1876.

L.R. 1 C. P. D. 423.

[*Carrier—Excepted Risks—"Act of God."*]

[THE plaintiff, being the owner of two horses, and having occasion to send them from London to Aberdeen, shipped them on board a steamship belonging to the company of which the defendant was the representative, and plying regularly as a general ship between the two ports. The horses were shipped without any bill of lading. In the course of the voyage a storm of more than ordinary violence arose; and partly from the rolling of the vessel in the heavy sea, partly from struggling caused by excessive fright, one of the animals, a mare, received injuries from which she died. An action was brought to recover damages in respect of her loss.

The jury negatived any want of due care on the part of the defendant, either in taking proper measures beforehand to protect the horses from the effect of tempestuous weather, or in doing all that could be done to save them from the consequences of it after it had come on. A further question put to the jury was, whether there was any known means, though not ordinarily used in the conveyance of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare, but to this question the jury returned no answer.

For the defendant, it was insisted that the storm, which was the cause of the loss, must be taken to have been an "act of God" within the legal meaning of that term; so as to afford immunity to the company, as carriers, from liability in respect of the loss complained of. The question therefore arose, whether this contention was well founded. Judgment was given by the Common Pleas Division in favour of the plaintiff. They held that the owners of all ships, whether common carriers or not, are equally liable for loss by inevitable accident; and that to bring the cause of loss within the meaning of the term "act of God," so as to give immunity to the carrier, the loss must have been caused directly and exclusively by such a sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or (if he could foresee that it would happen) could not by any amount of care and skill resist so as to prevent its effect. They also considered that, notwithstanding the inability of the jury to agree to an answer to the final question left to them, the defendant had failed to satisfy the burden of proof cast upon him, so as to bring himself clearly within this definition of an "act of God."]

The defendant appealed.

Cohen, for plaintiff. A storm somewhat more violent than usual is not, within the correct definition, an "act of God." To constitute such, there must be something extraordinarily violent, sudden, and overwhelming;...something that admits of no time for human intervention between itself and the damage caused....It must be something about which there could be no doubt and dispute as to its being the sole cause....

COCKBURN, C.J....As the vessel by which the mare was shipped was one of a line of steamers plying habitually between given ports and carrying the goods of all comers as a general ship, it necessarily follows that the owners were common carriers. It is therefore unnecessary to the decision of the present case to determine the question as to the liability of the owner of a ship, not being a general ship but one hired to carry specific cargo on a particular voyage, to make good damage arising from inevitable accident. The question not having before presented itself for judicial decision, I think it right to express my dissent from the reasoning of the Court below; the more so as, for the opinion thus expressed, I not only fail to discover any authority whatever, but find all jurists who treat of this form of bailment carefully distinguishing between the common carrier and the private ship....

In the absence of all common-law authority for the proposition that by the law of England every carrier by sea is subject to the same liability as the common carrier (as asserted in the judgment below), the authority of the Roman law is invoked. But the Roman law made no distinction between inevitable accident arising from what in our law is termed the "act of God" and inevitable accident arising from other causes; but, on the contrary, afforded immunity to the carrier [by sea] without distinction, whenever the loss resulted from "*casus fortuitus*," or, as it is also called, "*damnum fatale*" or "*vis major*"—unforeseen and unavoidable accident....Such is also the existing law of all the nations which have adopted the Roman law—France, Spain, Italy, Germany, Holland, and, to come nearer home, Scotland. It is embodied in the

Code Civil of France. Treating of carriers by land and by water the Code says (Art. 1754): "Ils sont responsables de la perte et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent qu'elles ont été perdues et avariées par cas fortuit ou force majeure."...We are not called upon to extend a principle of extreme rigour (peculiar to our own law, and the absence of which in the law of other nations has not been found by experience to lead to the evils for the prevention of which the rule of our law was supposed to be necessary), further than it has hitherto been applied. I cannot, therefore, concur in the opinion expressed in the judgment delivered by Mr Justice Brett, that by the law of England *all* carriers by sea are subject to the liability which by that law undoubtedly attaches to the common carrier, whether by sea or by land¹.

But there being no doubt that in the case before us the shipowner was a common carrier, we have now to deal with the question on which the decision really turns, namely, whether the loss was occasioned by what can properly be called the "act of God."

The definition given by Mr Justice Brett, of what is termed in our law the "act of God" is—that it must be such a direct, and violent, and sudden, and irresistible act of Nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. The judgment then proceeds: "We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him so as to bring himself clearly within the definition. It seems to me impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred."

It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term "act of God," as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavour to lay down an intelligible rule. Storm and tempest have always been mentioned as among the instances of *vis major* coming under the denomination of "act of God." But it is equally true, as has already been pointed out, that it is not under all circumstances that inevitable accident arising from the so-called act of God will (any more than inevitable accident in general by the Roman and continental law) afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end.

¹ [EDITOR'S NOTE. But the tendency of later judges has been to prefer the view of Brett, J., and impose on every carrier by sea (even when not a "common" carrier), not merely a bailee's liability for ordinary negligence, but an insurer's full responsibility for the goods carried, excused only by the act of God or of the King's enemies, or (under s. 502 of the Merchant Shipping Act, 1894, s. 502) by fire. See 16 Q.B.D. 633; 17 Q.B.D. 683; L.R. [1895] 2 Q.B. 379. The question will rarely arise in practice; as the terms of the charterparty, or bill of lading, will usually specify the extent of liability intended.]

It is at once obvious that all causes of inevitable accident—"casus fortuitus"—may be divided into two classes—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin (either in the whole or in part) in the agency of man, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term "act of God" to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term "act of God" is properly applicable.

On the other hand it is not because an accident is occasioned by the agency of nature (and therefore by what may be termed the "act of God") that it necessarily follows that the carrier is entitled to immunity. The rain which fertilises the earth and the wind which enables the ship to navigate the ocean are as much within the term "act of God" as the rainfall which causes a river to burst its banks, or the cyclone that drives a ship against a rock. Yet the carrier, who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care damage ensues, he remains responsible; though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered—if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided; or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm—the loss cannot be said to be due to the act of God alone; and the carrier cannot have the benefit of the exception. This being granted, the question arises as to the degree of care which is to be required of him to protect him from liability in respect of loss arising from the act of God. Not only has there been no judicial exposition of the...degree of care to be applied by the carrier in order to entitle himself to its protection, but the text-writers, both English and American, afford little or no assistance....Story, however, uses the following language: "The phrase 'perils of the sea,' whether understood in its most limited sense as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents occurring upon that element, must still (in either case) be understood to include such losses only as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power which cannot be guarded against by ordinary exertions of human skill and prudence. Hence it is that if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss 'by the perils of the sea' as will exempt the carrier from liability; but rather a loss by the gross

negligence of the party"; (Story on Bailments, 512 (a)). Story, it will be observed, speaks only of "ordinary exertions of human skill and prudence" and "the exercise of reasonable skill or diligence." In my opinion this is the true view of the matter. What Story here says of "perils of the sea" applies, I think, equally to the perils of the sea coming within the designation of "acts of God." In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known—or because it cannot be proved that if the ingenuity of engineers were directed to the subject something more efficient might not be produced—that the carrier can be made liable. I find no authority for saying that the *vis major* must be such as no amount of human care or skill could have resisted, or the injury such as no human ability could have prevented; and I think this construction of the rule erroneous. That the defendants here took all the care that could reasonably be required of them to insure the safety of the mare is, I think, involved in the finding of the jury, directly negating negligence. And I think that it was not incumbent on the defendants to establish more than is implied by that finding.

The matter becomes, however, somewhat complicated from the fact that the jury have found that the death of the mare is to be ascribed to injuries caused partly by the rolling of the vessel, partly by struggles of the animal occasioned by fright, leaving it doubtful whether the fright was the natural effect of the storm or whether it arose from an unusual degree of timidity peculiar to the animal and in excess of what would generally be displayed by horses. But the plaintiff is in this dilemma: if the fright which led to the struggling of the mare was in excess of what is usual in horses on ship-board in a storm, then the rule applies that the carrier is not liable where the thing carried perishes or sustains damage, without any fault of his, by reason of some quality inherent in its nature, which it was not possible for him to guard against. If, on the other hand, the fright was the natural effect of the storm and of the agitation of the ship, then it was the immediate consequence of the storm, and the injuries occasioned by the fright are sufficiently closely connected with the storm (in other words, with the act of God) to afford protection to the carrier. If the disaster is the result of a combination of causes for neither of which the carrier was responsible, he cannot be made liable any more than if it had resulted from either of them alone.

* * * * *

JAMES, L.J. The "act of God" is a mere short way of expressing this proposition: "A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively,

without human intervention, and that it could not have been prevented¹ by any amount of foresight and pains and care reasonably to be expected from him." In this case the defendant has made this out.

[Mellish, L.J., Cleasby, B., and Mellor, J., concurred.]

Judgment reversed.

SECTION II

BY NEW AGREEMENT

LANGDEN v. STOKES.

KING'S BENCH. 1634.

CROKE CHARLES, 383.

[*Agreement—Exoneration before Breach.*]

ASSUMPSIT. Whereas the defendant, April 2nd (for such a valuable consideration) assumed to go such a voyage in such a ship before August following; and alleges a breach in the non-performance. The defendant pleaded that before any breach the plaintiff, the fourth of April, at such a place, exoneravit eum of the said promise. Hereupon the plaintiff demurred. And now *Rolls* for the plaintiff alleged, that this pleading a discharge, without shewing how, was not good; and he cited divers books, 22 Ed. IV, 40. Quod indemnem conservet, or exonerabit, is no Plea. But *Maynard* for the defendant argued to the contrary, that for as much as this was an action grounded upon a promise by words, it may be discharged by words, before the breach thereof: and therefore exoneravit generally is a good plea; and he cited for this, 3 H. VI, 36. And of this opinion was all the Court (absente BERKELEY). And RICHARDSON said, that he knew it had been so resolved divers times; and the Rule was remembered *eodem modo quo oritur, eodem modo dissolvitur*. Wherefore it was adjudged for the defendant.

EDWARDS v. WEEKS.

COMMON PLEAS. 1677.

2 MOD. 259.

[*Agreement—Exoneration after Breach.*]

ASSUMPSIT. The plaintiff declared, that the defendant, in consideration that the plaintiff at his request had exchanged horses with him, promised to pay him five pounds; and he alleged a breach in the non-performance. The defendant pleads, that the plaintiff, before any action brought, discharged him of his promise.

And upon a demurrer the question was, Whether after a breach of a promise a parol discharge could be good? The case of *Langden v. Stokes* (*supra*) was an authority that such a discharge had been good before

¹ [EDITOR'S NOTE. Hence damage done by rats is not included under the term "act of God"; *Dale v. Hall* (1 Wilson, 281).]

the breach....But here was no time agreed for the payment of this five pounds, and therefore it was due immediately upon request; and not being paid, the promise is broken, and the parol discharge cannot be pleaded.

And of that opinion was ALL THE COURT, and judgment for the plaintiff.

Quære. If he had pleaded such a discharge before any request of payment, whether it had been good?

[*Cf. Foster v. Dawber, infra, p. 364.*]

KING v. GILLETT.

EXCHEQUER. 1840.

7 MEESON & WELSBY, 55.

[*Exoneration before Breach.*]

ASSUMPSIT for the breach of a promise to marry the plaintiff in a reasonable time. Plea, that after the making of the promise, and before any breach thereof by the defendant, the plaintiff wholly exonerated the defendant from his promise.

Special demurrer....

The plaintiff contends that a contract founded on mutual promises can only be rescinded before breach by mutual consent; and that a mere discharge by one of the parties, without any act of the other party, is incomplete. The defendant contends that a promise may be discharged by parol before breach; and that in pleading it is not necessary to state the evidence of such discharge or that there was any consideration for the same.

Perry, in support of the demurrer. This plea may be proved in many different ways, and the plaintiff is left entirely in the dark as to what is the real ground of defence....The pleadings in *Langden v. Stokes* are not fully set out; and it is quite consistent with all that appears in the report, that the plea may have shewn an agreement, and a mutual exoneration of each party by the other. The rule of the civil law (Dig. xvii. 35) is: "Nudi consensûs obligatio *contrario consensu* dissolvitur."... In *Hurford v. Pyle* (Cro. Jac. 483), it was held that a contract founded on mutual promises could not be discharged but with consent of both parties. Where the consideration for the promise is *executed*, but something remains to be done by one party, there a discharge by the other before breach may be a discharge in toto; but where it is a contract founded on mutual promises, it can be discharged only by mutual consent, and the plea of *exoneravit eum* does not apply to such a case. On this principle rest the decisions in *Leigh v. Paterson* (2 Moore 588) and *Phillpotts v. Evans* (5 M. & W. 475), where it was held that a contract to deliver goods on a certain day cannot be got rid of by a notice from the seller, before that day, that he shall not deliver the goods, unless it be assented to by the buyer....

ALDERSON, B. The question was this: Whether, to an action founded on mutual promises to marry within a reasonable time, the defendant

could plead that, before any breach of contract on his part, "the plaintiff wholly exonerated him" from the performance of that contract¹. It was contended that the proper plea was, that before breach, the plaintiff and defendant by mutual agreement had rescinded the contract. No doubt such a plea would be good; but the form of the present plea has been held good in several cases. *Langden v. Stokes* explains the matter and reconciles the present plea with general principles. It seems to have been treated there as a mere question of the form of plea—and so we think it is. For, although this plea is good in point of form, yet we think the defendant will not be able to succeed upon it at Nisi Prius, unless he proves a proposition to exonerate on the part of the plaintiff, *accedens to by himself*; and this in effect will be a rescinding of the contract previously made.

Judgment for defendant.

FOSTER v. DAWBER.

EXCHEQUER. 1851.

6 Ex. 839

[*Negotiable Instruments—Exoneration.*]

[THE plaintiff was executor of one J. Clark, of Lincolnshire; and the defendant, who had married J. Clark's daughter, carried on business at Hull. In 1835, J. Clark lent to the defendant 500*l.* upon his promissory note; and in 1842 another sum of 500*l.*, upon a similar note. It being arranged that new promissory notes should be substituted; the defendant gave J. Clark the two notes upon which this action was brought (dated December 7th, 1845, and January 20th, 1846); and the other notes were then destroyed. In February, 1846, J. Clark visited the defendant at Hull, and, in the course of conversation upon family affairs, told the defendant that he intended to give him the 1000*l.* secured by the two promissory notes;...and directed the defendant to write out a receipt for such 1000*l.* and interest. That thereupon the defendant purchased a 10*s.* receipt stamp, for the purpose of such receipt. J. Clark desired that the interest on the 1000*l.*, which was in arrear, should be taken at the sum of 80*l.*; and directed the defendant to write a receipt for the sum of 1080*l.*...as follows: "Hull, 16th February, 1846.—Received of Robert Dawber the sum of 1080*l.*, being the interest and principal on two notes dated December, 1845, and January, 1846, and in full of all demands." J. Clark, when he had so signed the receipt, gave the same to the defendant in the presence of one Newton. J. Clark never applied to the defendant for payment of interest, (nor was any interest paid) after the 16th of February, 1846. In January, 1850, J. Clark died; having previously made a will, whereby he bequeathed the two sums of 500*l.*, and the promissory notes in question, to the plaintiff, upon certain trusts.

¹ [EDITOR'S NOTE. In *Davis v. Bomford* (6 H. & N. 245) may be found an amusing discussion as to what will be sufficient evidence of a lady's having actually exonerated a fiancé, who returned to her her letters and begged to be released, but whose letters she declined to part with.]

This action was commenced in 1850, to recover the sums due for principal and interest on the two notes of 1845 and 1846. The defendant pleaded four defences: (a) by his 1st and 5th pleas, payment by him of the notes; (b) by his 3rd plea, a release of the debt in consideration of 10s. paid by him for the stamped paper and of his writing the receipt on it; (c) by his 2nd plea, a gratuitous discharge of the debt; (d) by his 6th plea, the Statute of Limitations. Lord Campbell, C.J., directed a verdict for the plaintiff on (a) and on (d); but left (b) and (c) to the jury, who on them found for the defendant. Motion for a new trial.]

Willes, for plaintiff.... There was evidence to take the case out of the Statute of Limitations; for either the giving of the substituted notes, or the transaction relating to the receipt which included the interest then due, was an acknowledgment of the debt by part payment.

[ALDERSON, B. If that transaction is to be taken as a payment, it was a payment of the *whole* debt.]

The second plea is not supported by the evidence. The transaction between Clark and the defendant amounted to a gift of the notes to the defendant. An exoneration differs from a gift, in being founded upon an arrangement between the parties, *King v. Gillett* (7 M. & W. 55); a gift rests entirely with the party who possesses the property which he passes by the gift. But this transaction is not good as a gift; for neither was there any promise under seal, nor did the donor give the instrument (which was the subject-matter of the gift) to the defendant. The allegation, that the act took place "before breach" is not proved, for a breach exists upon the delivery of the note.

No case is to be found which decides that a debt due upon a promissory note between the *immediate* parties can be waived by parol....

Shee, Serjt., for defendant. The facts stated support the pleas of payment. The transaction is in effect the same as if the defendant had handed over the money to the testator, and the latter had returned it to the defendant. This is as much a payment as when two persons meet together and agree that their mutual debts shall be set-off the one against the other; or when goods are delivered in satisfaction of a debt. Suppose the defendant had given the testator a cheque for the amount, and the latter had returned it to the defendant, would not that have been evidence of payment? If, as stated by Parke, B., in *Sibree v. Tripp* (15 M. & W. 23), payment of part of a debt may, under certain circumstances, be evidence of a gift of the remainder, and so support a plea of payment, why may not a gift of the whole be equally cogent evidence? Can it make any difference that the parties omitted to say "we mean that for payment"?

[PARKE, B. It is difficult to see how this can be considered as a payment, because no money passed. The parties erroneously supposed that the debt would be discharged by a receipt in full.]

...The jury were warranted in finding a verdict for the defendant on the bargain stated in the third plea. In *Moss v. Hall* (5 Exch. 46), this Court held, that an agreement between the holder and the acceptor of a bill of exchange, by which the acceptor undertook to do his best endeavours to procure a new bill of exchange in lieu of that upon which

the acceptor was liable, disclosed a sufficient consideration for a promise by the holder to suspend the action then pending against the acceptor upon the bill.

[PARKE, B. It is absurd to say that there was any agreement that the defendant should get rid of his liability upon the consideration stated in that plea.]

There was some evidence of such an arrangement, and the jury have so found it.

PARKE, B. The transaction stated in the defendant's answer does not amount to payment. When the receipt in full was given, it was *primâ facie* evidence against the plaintiff that the amount stated in it was paid; it was not conclusive evidence. It is competent for the parties to contradict such a receipt, by shewing that the money was not in fact paid. Now, both Clark and the defendant knew perfectly well that neither principal nor interest was paid. Then it is said that it afforded some inference of an agreement between the parties that, although the money was not paid, they should be in precisely the same situation as if it had been paid. We think, however, that the receipt cannot extend so far as to place them in the same situation as if the money had been paid by the defendant to Clark in discharge of the promissory notes, and afterwards given back by Clark to the defendant. To prove such a transaction, a great deal more is required than a mere receipt in full of all demands. The case differs entirely from that where two parties meet and state an account, and, in order to render it valid and binding, each admits that the other has a set-off against him. Under such circumstances, the Courts consider that the parties are upon the same footing as if the debt due from each were paid to the other, when, instead of going through that process, they set off the one against the other.

The next question is whether there was evidence to go to the jury on the third plea. To support that plea, the defendant must shew a bargain made with him, that, as a consideration for Clark's giving up the two promissory notes, the defendant should purchase a piece of paper marked with a 10s. receipt stamp, and write out a receipt upon it, and suffer Clark to sign the same; and that 1000*l.* should be the compensation to be paid for doing this. If the evidence be looked at, it is impossible to suppose that such was the real meaning of the parties. There is nothing in the nature of a bargain that the testator would make the defendant a present of the money, if the defendant would be at the trouble of purchasing a stamp and writing out a receipt....From the first the intention of Clark was to make the defendant a present of the amount of these notes. It is too much to say that it was parcel of the bargain that the 1000*l.* should be given up if the defendant wrote the receipt, but should be retained by the testator if he did not. The gift would have taken place just the same if Clark himself had had to write out the receipt. There was no evidence to warrant the jury in finding any such bargain.

Upon the question whether the evidence supported the second plea, there is no doubt that the testator meant to discharge the defendant from all liability upon the notes. But it was contended that, as the plea

stated the transaction to have taken place before breach, the plea was not proved. The plea is inartificially drawn, and appears to have been copied from the precedents of a plea in discharge of an *executory* contract. It is competent for both parties to an *executory* contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an *executed* contract cannot be discharged except by release under seal, or by performance of the obligation (as by payment, where the obligation is to be performed by payment). But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts¹; and we think the words "before breach," when taken with reference to those instruments, are either idle or absurd. If they are to be taken as having any meaning in this plea, they must be read in conjunction with the context, and merely amount to an allegation that Clark discharged the defendant from all liability before any demand of the money mentioned in the notes. If that be so, the plea was proved, for Clark exonerated the defendant before he called on him to pay the amount of the notes. We are, therefore, of opinion that the plea was proved.

The next question is, whether the plea is good after verdict. Mr Willes disputed the existence of any rule of law by which an obligation on a bill of exchange, by the law merchant, can be discharged by parol; and he contended that the authorities merely went to shew that such an obligation might be discharged as to remote but not as between immediate parties. Although there is no case precisely on the point as between immediate parties, we do not see any sound distinction between immediate and distant parties. But Mr Willes further contended that though the rule might be true with respect to bills of exchange, it did not apply to promissory notes. The negotiability of promissory notes was created [not by the custom of merchants, as was the negotiability of bills of exchange, but] by the statute 3 & 4 Anne c. 9...., and we think the same law applies to both instruments. The plea is, therefore, good after verdict.

The remaining question is on the Statute of Limitations. It was contended that this transaction of the 16th of February, 1846, must be considered as in effect a part payment of the original debt, and took the case out of the statute. But we think otherwise. There was no proof of any actual payment of the sum of 80*l.* for interest. It was all parcel of the same transaction; and the supposed payment (which was only constructively a payment) of interest, and the evidence, by no means justify the inference that the defendant promised to pay the notes. But even upon the supposition of its being a part payment, it was not such within the Statute, for it must be a payment of a portion of the

¹ [EDITOR'S NOTE. This "different footing," created by the custom of merchants, is now recognised by the Bills of Exchange Act, 1882; s. 62 provides that "(1) When the holder of a bill, *at or after* its maturity, absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up. (2) The liabilities of any party to a bill [so including acceptor] may in like manner be renounced by the holder, *before, at, or after* its maturity." By s. 89 (1) this applies to promissory notes also.]

debt, accompanied by an acknowledgment from which a promise may be inferred to pay the remainder. The defendant clearly intended to pay the *whole* in full. Then the only remaining question is, whether the renewal of the two promissory notes by those given in 1845 and 1846, could be considered as a new promise to pay the original two loans of 500*l.* each, and to take the case out of the statute. But we think they could not. All that can be inferred from the giving of those notes is, that the defendant thereby intended to give a fresh security, limited to his liability on the notes themselves, without any intention on his part to renew his liability on the original demand. The promise was confined to the notes themselves; and we think there was no sufficient evidence to take the case out of the Statute of Limitations in regard to the original debt. This issue ought, therefore, to have been found for the defendant.

New trial ordered.

GOSS v. LORD NUGENT.

KING'S BENCH. 1833.

5 B. & Ad. 58.

[Statute of Frauds—Oral agreement to vary.]

THE plaintiff having advertised some land for sale by public auction, the defendant agreed to purchase it by private contract, agreeably to the printed conditions of sale. The memorandum of agreement, which was annexed to the conditions of sale, was: "Thomas Goss, in consideration of 80*l.* paid to him by Lord Nugent at the time of signing this agreement, and of 370*l.* to be paid to him on September 29th next, doth agree to sell to Lord Nugent and Lord Nugent agrees to purchase of T. Goss all the premises described in the particulars hereunto annexed." The fifth condition of sale was: "That the vendor, at his own expense, shall deliver to each purchaser an abstract of the title to the property sold, and deduce a good title thereto; and upon the purchaser's payment of the remainder of the purchase money and complying with these conditions, the vendor shall, at each purchaser's expense, convey his lot to or as directed by him." The defendant was afterwards informed by Hatten, the plaintiff's attorney, that as to one lot of thirty-five feet, there was a defect in the title. The defendant said he would accept the title notwithstanding that defect; and possession of the whole was delivered to him. The vendor was called upon by the defendant's solicitor, to furnish an abstract of title, and he delivered one on September 10th. In November the defendant's solicitor objected to the title as to the thirty-five feet. Hatten said the objection had been waived. The defendant then refused to complete the purchase. It was objected that oral evidence of the defendant's waiver of his right to have a good title made out was not admissible; because the action being on a contract for the sale of land, the Statute of Frauds required the whole agreement to be in writing. Gaselee, J., received the evidence; and directed the jury to find for the plaintiff if they thought there had been a waiver by the defendant of the right in question. The jury having found for the plaintiff, the defendant moved to enter a nonsuit.

Kelly, for plaintiff. Oral evidence of any thing which occurred at the time when the written contract was entered into cannot be received to vary it. But here, the agreement in writing, not being under seal, is a mere parol agreement; and being executory, it might at common law be discharged, before breach, by a subsequent unwritten agreement. The only question, therefore, is, whether, by the Statute of Frauds, evidence of such unwritten agreement is excluded. That statute contains no provision for the dissolution of agreements. The plaintiff declares upon the written agreement, and alleges that the defendant waived his right to insist on a good title to part of the land.

[PARKE, J. Assuming that a written contract concerning land may be wholly waived by a new agreement not in writing; here there has not been a waiver of the entire agreement, but of a part of it only. The effect of that waiver is to substitute for the original contract a new one, proved partly by matter in writing, and partly by oral testimony.]

The original agreement consists of two parts: the first is for the sale of land; the second is for making a good title to that land. The agreement, so far as it is a contract for the sale of land, cannot be altered by matter not in writing; but so far as it relates to making a good title, it may be so varied. Here, the verbal alteration does not in any degree *vary* what is to be done by either party. The same land is to be conveyed, the same extent of interest, at the same time, and the same price is to be paid. The oral evidence, therefore, is offered, not to vary the original agreement, but to shew that it was discharged in part. There are cases, even within the Statute of Frauds, where parol evidence is admissible to shew a dispensation with the performance of part of the original contract; such as an agreed substitution of other days than those stated in the contract for the delivery of goods sold, *Cuff v. Penn* (1 M. & S. 21), *Warren v. Stagg* (3 T.R. 591). There is no difference in principle between a waiver of title, and a waiver of the time for completing the contract....

DENMAN, C.J....If the present contract was not subject to the control of any act of parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained....The Statute of Frauds does not say in distinct terms that all agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing. And as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing¹. It is not, however, necessary to give an

¹ [EDITOR'S NOTE. Thus in *Morris v. Baron* (L.R. [1918] A.C. 1) it was decided that a written contract for the sale of goods, of the value of £10 or upwards, may be rescinded, even by implication, by a merely parol and unenforceable agreement, if that agreement be clearly intended to effect "a complete extinction of the first and formal contract, not merely an alteration (however sweeping)" that would leave the first contract still subsisting. The same rule would apply if the contract were for the sale of land.]

opinion upon that point, as this is not a waiver of the whole written agreement, but only a part of it; and the question is, what is the effect of that?

It may be said by the plaintiff, that this does not in any degree vary what is to be done by either party; that the same land is to be conveyed, the same extent of interest in the land is to be conveyed at the same time, and the same price is to be paid; and that it is only an abandonment of a collateral point. But we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only.

In the present case, the written contract is not that which is sought to be enforced; it is a new contract which the parties have entered into, is to be proved partly by the former written agreement and partly by the new verbal agreement. The present contract, therefore, is not a contract entirely in writing. As to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for, if there be not a good title, the land may, in some instances, better not be conveyed at all. But our opinion is not formed upon the stipulation about the title being an essential part of the agreement, but upon the general effect of the Statute of Frauds, and that the contract now brought forward by the plaintiff is not wholly a contract in writing¹.

We do not say that verbal evidence may not be given of customs and usages applicable to the subject matter of the written contract where the contract is silent; that has been done in a great variety of instances.

Whether the plaintiff may not have relief in a Court of equity, we give no opinion. There have, however, been some cases at law on contracts within the Statute of Frauds, where verbal evidence has been allowed; *Warren v. Stagg* and *Cuff v. Penn* were cases where the time for the performance of the contract had been enlarged by a verbal agreement. They were decided on the ground that the original contract continued, and that it was only a substitution of different days of performance. It is not necessary to say whether these cases were rightly decided²; if they were so, still the present is a different case; for here, without doubt, the terms of the original contract were varied.

Plaintiff nonsuited.

[EDITOR'S NOTE. "The principle of *Goss v. Lord Nugent* is, I have no doubt, perfectly correct" as to a sale of land within s. 4 of the Statute of Frauds; "the question is, whether the same reasoning does not apply to a sale of goods under s. 17. It appears to me that no distinction can be made"; *per* Parke, B., (6 M. & W. at p. 117).]

¹ [EDITOR'S NOTE. Hence even if the new verbal agreement be one which does not require writing (e.g. for services to be completed within a year) it cannot vary the former written one which did require writing (e.g. for a two years' service); see *Morris v. Baron* (L.R. [1918] A.C. 1).]

² [EDITOR'S NOTE. They were *not* rightly decided: and were overruled in *Steel v. Dawber* (2 P. & D. 447), and *Marshall v. Lynn* (6 M. & W. 116).]

HICKMAN v. HAYNES.

COMMON PLEAS. 1875.

L.R. 10 C.P. 598.

[*Statute of Frauds—Postponement of delivery requested.*]

[THIS was an action for breach of a contract to accept 100 tons of iron by monthly deliveries of 25 tons in March, April, May, and June, the breach alleged being the refusal to accept the last quantity of 25 tons in June. The contract was in writing as required by the 17th section of the Statute of Frauds. The bought-note was as follows:

“Tipton, 6th March, 1873. Bought of Alfred Hickman, one hundred tons of Grey Forge Mine pig iron, at 7*l.* 10*s.* per ton. Delivered at Tivendale Street Mills. Payment in cash, less 2½ discount, monthly. Delivery twenty-five tons this month, and twenty-five tons per month during April, May, and June.

J. P. Haynes.”

Pursuant to this contract the plaintiff delivered and the defendants accepted and paid for seventy-five tons of the iron; but, owing to the circumstances stated below, the plaintiff did not deliver the last twenty-five tons. Twice in June the defendant saw the plaintiff, and verbally requested him to allow the delivery of the last twenty-five tons to stand over, and the plaintiff verbally assented. Nothing further was done by either side until the 1st of August, 1873, when plaintiff wrote to defendants as follows: “Permit me to call your attention to your contract with me for pig iron, of which twenty-five tons remain to be delivered. I have held them until now, as you requested, and shall be glad to know when you propose to take delivery. If it is not convenient for you to take the iron, I shall be glad to know if you will be willing to pay the difference in price, if I instruct Mr Lewis to sell them.”

By a letter written on the 9th of August the defendants asked for more time. The plaintiff again waited for a reasonable time, but without result. In October, 1874, the writ was issued, claiming the price of the 25 tons.

A verdict was found for the plaintiff, damages 25*l.* The defendants moved for a nonsuit, or for a reduction of the damages on the ground that the parol agreement to postpone delivery of the iron was invalid under the Statute of Frauds, or that the damages should be reduced to 21*l.* 17*s.* 6*d.*, or to 7*l.* 5*s.*, if the Court should be of opinion that they ought to be assessed on June 30th, or on June 2nd.]...

Benjamin, Q.C., for defendant. There never was any breach of the original contract, and the new agreement for delivery at a later period, being by parol only, cannot be valid. The contention of the plaintiff that there was a prospective breach before the expiration of the time for delivery, according to the principle laid down in *Hochster v. De la Tour* (2 E. & B. 678) cannot be sustained; for, in order to make the prospective refusal of the defendants to perform a breach, it must be accepted as such. If the plaintiff does not accept it as such, but goes on with the contract, he cannot afterwards say it was broken before the time for

performance: *Frost v. Knight* (L.R. 7 Ex. 111). Here, the defendants' statement that they would not take delivery is not treated as a breach by the plaintiff. Then, if this be so, there is no evidence of a breach in June, because before the time for delivery, and before breach, the parties mutually arranged that the one should not make or the other accept delivery in June. There can be no refusal to accept in June, because there was no tender of delivery. *Ogle v. Lord Vane* is not the present case; there, a breach having been committed, the plaintiff voluntarily forbore to insist on performance, and it was held that this might postpone the period of calculating the damages. Here, the agreement to postpone was before breach. It is clear that the parties did not contemplate that after that arrangement non-acceptance in June should constitute a breach of contract.

LINDLEY, J....It is contended that, having regard to the Statute of Frauds, and to the decisions of *Noble v. Ward* (L.R. 2 Ex. 135), *Stead v. Dawber* (10 A. & E. 57), *Goss v. Nugent* (*supra*, p. 368), the plaintiff could not maintain his action, and ought to be nonsuited. The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance, is very startling, and if well founded will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff.

The Statute of Frauds contains no enactment to the effect contended for. The utmost effect of the 17th section is to invalidate any verbal agreement for the sale of goods in certain cases. And, even if a verbal agreement for extending the time for the delivery of goods already agreed to be sold is within the statute—as to which see *Tyers v. Rosedale* (L.R. 10 Ex. 195) and *Leather Cloth Co. v. Hieronimus* (L.R. 10 Q.B. 140)—the plaintiff in this case is not attempting to enforce any such verbal agreement, but is suing on the original agreement, which was in writing.

Noble v. Ward merely shews that a parol agreement to extend the time for performing a contract in writing, and required so to be by the Statute of Frauds, does not in any way affect such written contract, and cannot in point of law be substituted for it¹. In *Stead v. Dawber* there was a written agreement for the delivery of goods on a particular day, and a subsequent verbal agreement for their delivery on a later specified day; and the Court came to the conclusion that the parties intended to substitute the later verbal agreement for the previous written agreement. But, in the case now before the Court, there was no fresh agreement at all, for the delivery of the twenty-five tons, which can be regarded as having been substituted for the original written contract. There was nothing more than a waiver by the defendants of a delivery by the plaintiff in June of the last twenty-five tons of iron; and in *Stead*

¹ [EDITOR'S NOTE. The student of General Jurisprudence will find in *Noble v. Ward* a striking instance of the vagueness of Judiciary Law; three different views might plausibly be taken as to what its *ratio decidendi* is. The view ultimately established by the House of Lords will be found in *Morris v. Buron* (L.R. [1913] A.C. at pp. 13, 17).]

v. *Dawber* the Court would have been in favour of the plaintiff if they had come to the conclusion that there had been no substitution of one agreement for another.

Goss v. Lord Nugent turned on the 4th and not on the 17th section of the statute; but we do not think this important. The Court, in this case also, regarded the parties as having entered into a new verbal contract as to part of the property, and as having substituted this contract for the original written contract; and in this view of the case the plaintiff could not recover.

The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. But, so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it. There was, in truth, in this case no binding agreement to enlarge the time for delivery. The plaintiff permitted the defendants to postpone, for their own convenience, the acceptance of the iron in dispute; and the voluntary withholding delivery at the request of the defendants was usual in the ordinary course of dealings of a similar kind in the iron trade. At any time in June either party could have changed his mind, and required the other to perform the contract according to its original terms: see *Tyers v. Rosedale*.

The distinction between a substitution of one agreement for another and a voluntary forbearance to deliver at the request of another, was pointed out and recognised in *Ogle v. Lord Vane* (L.R. 3 Q.B. 272). In that case the...request for forbearance was made by the vendor after the contract had been broken. In this case the request for time was made by the purchasers both before and after the time for completing the contract had expired; but this distinction does not appear to us to be material.

Although the plaintiff assented to the defendants' request not to deliver the twenty-five tons of iron in question in June, he was in truth ready and willing then to deliver them; and the defendants are at all events estopped from averring the contrary. The plaintiff not having bound himself by any valid agreement to give further time, but having for the convenience of the defendants waited for a reasonable time, is entitled on the expiration of that time to treat the contract as broken by the defendants at the end of June; when in truth it was broken.

The question whether the damages ought to be estimated at 21*l.* 17*s.* 6*d.*, i.e. according to the price of iron at that time, or at 25*l.*, i.e. according to the price at the end of a reasonable time after the letter of the 9th of August, was admitted to be immaterial; but, on the principle of *Ogle v. Lord Vane*, we think the plaintiff was entitled to have the damages assessed according to the price at the later date.

Judgment for plaintiff.

PLEVINS v. DOWNING.

COMMON PLEAS DIV. 1876.

L.R. 1 C.P.D. 220.

[Delivery postponed without request.]

ACTION for non-acceptance of iron pursuant to contract.

The action was founded upon the following bought-note, dated June 15th, 1874, and signed by the defendant:

"Bought of Messrs Plevins & Co. 100 tons of grey forge pig-iron at 75s. per ton, delivered to my works. Payment in cash, less $2\frac{1}{2}$ per cent. discount, on the 10th of each month following delivery. Delivery, 25 tons at once, and 75 tons in July next."

The first 25 tons were delivered immediately, and 50 tons more in July. On October 15th the defendant said to the plaintiffs' manager, "You have not sent any pigs lately"; to which the plaintiffs' manager replied, "I will send you a boat this week"; and accordingly the plaintiffs forwarded 25 tons addressed to the defendant, but not at his works; and the defendant, on being informed by letter that the iron had been dispatched, declined to receive it.

Upon this evidence, Quain, J., directed a verdict to be entered for the defendant. The plaintiffs moved to enter the verdict for them.

* * * * *

Matthews, Q.C., for plaintiffs. The only question is whether there was any evidence to go to the jury of an agreement to vary the time of delivery.

[BRETT, J. Are you suing upon the original or upon a substituted contract?]

Upon the original contract. There was evidence that the parties, for their mutual convenience, agreed to substitute one mode of performance for another; and that may be done by parol.

[BRETT, J. Could the plaintiffs on the expiration of the month of July have sued the defendant for not accepting the iron?]

Undoubtedly they could not....

There clearly was some evidence to go to the jury. A waiver of the condition as to time may be either by words or by acts and conduct. An assent to the substituted performance of a contract for the transmission of goods in the change of route need not be in writing: *Leather Cloth Co. v. Hieronimus* (L.R. 2 Ex. 135). If there was a new contract, there clearly was evidence of a delivery and acceptance under it which entitled the plaintiffs to sue for the price of goods sold and delivered.

BRETT, J....It seems to us that the verdict was rightly directed to be entered for the defendant. It is true that a distinction has been recognised between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the Court cannot give effect, in favour of either, to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced.

Where the vendor, being ready to deliver within the agreed time, is shewn to have withheld till after the agreed time his offer to deliver in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract,...but that he did not offer to deliver within the agreed time because he was, within such time, requested by the vendee not to do so. The original contract is unaltered, and the arrangement has reference only to the mode of performing it. But, if the alteration of the period of delivery were made at the request of the vendor (though such request were made during the agreed period for delivery) so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not prove that he was ready to deliver according to the terms of the original contract. The statement shews that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman v. Haynes* (*supra*, p. 371).

In the present case, the plaintiffs cannot prove that they were ready to deliver the disputed iron in July. They cannot say that, being so ready, they withheld an offer to deliver in July at the request of the defendant made in July. The day after the end of July they could not have insisted on an acceptance of iron then offered to the defendant.

Inasmuch as they cannot rely upon their readiness to deliver according to the terms of the original contract (because they were not so ready and willing), they are logically driven to rely upon the subsequent request of the defendant; either as a proposed alteration of a term of the original contract, or as a request upon which to hang a new contract to accept. But, as the request was merely verbal, the undertaking sought to be founded on it cannot be enforced. As to the suggestion that there was such a delivery and acceptance according to the terms of a new contract as can support an action for goods sold and delivered, we think there was no sufficient evidence of such a delivery and acceptance.

Judgment for defendant.

BILBOROUGH v. HOLMES.

CHANCERY. 1876.

L.R. 5 CH. D. 255.

[*Substituted Contract—Change of Firm—Novation.*]

PRIOR to April 16th, 1872, John Holmes, the testator in the cause, and one George Exley, carried on in partnership the business of bankers, under the firm of John Holmes & Co., and by the name of the Leeds Mercantile Bank.

On April 16th, two new partners, Woodhead and Joseph Holmes, were admitted into the firm. Notice of the admission of the new partners as members of the firm was given by circular to all the customers of the bank, including the present claimants, and the business was carried on by the old and new partners together¹.

On April 29th, 1872, the testator died. The present claimants knew of his death, and made no claims then against his estate.

After the testator's death the business was carried on under the same firm by Exley, Woodhead, and Joseph Holmes, till the 23rd of May, 1874, when Exley also died: and from that time the business was carried on by Woodhead and Joseph Holmes, still under the firm of John Holmes & Co., down to December, 1875, when the firm stopped payment.

When a depositor drew out of the bank any portion of his deposit, or paid in any further sum to his deposit account, he always gave up his old deposit note, and received a fresh note precisely in the same form for the amount then standing to his credit. These notes were, both before and after the death of the testator and down to the stoppage of the bank, signed "John Holmes & Co." Moreover, whenever any interest on a deposit note was credited to a depositor and not drawn out, a fresh deposit note was given to him and the old one was cancelled.

All the holders of deposit receipts, including the present claimants, proved in the bankruptcy against Woodhead and Joseph Holmes for the amount of the principal moneys and interest due on their deposit notes; and each supported his claim by an affidavit that Woodhead and Joseph Holmes were justly and truly indebted in the sum specified "for money lent and advanced by me to the said debtors," for which sum they had not "had or received any satisfaction or security except the following deposit receipt." They then each scheduled a deposit note signed "John Holmes & Co.," that in Priest's case being dated the 1st of July, 1875, that in Stoney's case, the 13th of November, 1873, and those in Amiel's case, May and October, 1866, and July, 1870. All, on May 25th, 1876, received a dividend of 2s. 6d. in the pound.

But the claimants now deposed that, at the time they made their affidavits in proof of their claims against the estates of Woodhead and Joseph Holmes, they did not intend to do, nor did they understand that they were doing, anything which could be construed into an election by them of a remedy against the estates of the bankrupts in lieu of their claims against the testator.

The present action having been brought in December, 1875, by the executors of John Holmes' will for the administration of his real and personal estate...the persons who held deposit notes of the bank at the time of his death sent in claims against his estate for the amounts remaining due to them upon their deposit notes. Three classes of questions arose; and were submitted to the Court upon a representative case selected from each class of claimants.

¹ [EDITOR'S NOTE. "The mere fact of a customer's continuing his business with a bank for *so short* a period as five months, has never been held to constitute a Novation of contract so as to discharge a deceased partner's estate"; *per* Kay, J.]

The first case was that of Miss Amiel, who had not altered the amount of her deposit. She was the holder of three deposit notes given to her upon deposits made in 1866 and 1870, during the lifetime of the testator and before Woodhead and Joseph Holmes became partners; and she had neither increased nor diminished the amount of her deposits, but had regularly received interest upon them from the old and new partners down to the stoppage of the bank.

The second case was that of Mr Priest, who had increased the amount of his deposit. He had made a deposit of 186*l.* in January, 1872, during the lifetime of the testator, and when he and Exley were the only members of the firm; and after the testator's death he from time to time deposited additional moneys, continuing to do so after Woodhead and Joseph Holmes had become the only members, and on each occasion he received a fresh deposit note for the aggregate amount of his deposit. The deposit note he held at the time the firm stopped payment was for 254*l.*; and he claimed the 186*l.* due at the testator's death.

The third case was that of Mr Stoney, who had diminished the amount of his deposit. He was at the time of the testator's death the holder of a deposit note for 720*l.*, given when the testator and Exley were the only partners. In August, 1872, when Exley, Woodhead, and Joseph Holmes were the partners, he withdrew 100*l.* and received a fresh note for 620*l.*, and he withdrew a further 100*l.* in the following November, receiving from the same three partners a note for 520*l.* He also received interest until the stoppage of the firm.

Robinson, Q.C., for the claimants. None of the claimants, in proving against the estate of the bankrupts, had any intention of accepting a remedy against that estate in lieu of the liability of the estate of the testator, nor did their so proving have the effect of releasing his estate. If not, there is, as regards Miss Amiel's case, nothing but her leaving her money in the bank and continuing to receive interest from the new firm upon what she lent to the old firm; and, as regards Stoney's and Priest's cases, the additional fact that they took new deposit notes upon altering the amount of their deposits.

This receipt of interest, however, did not deprive Miss Amiel of her right against the estate of the testator; *Daniel v. Cross* (3 Ves. 277). Again, the leaving of money by a creditor of a bank in the hands of the surviving partners does not constitute a new contract, or operate as a relinquishment of the old security: *Sleech's Case* (Mer. 568).

Nor, as regards the other two cases, is the taking a new security enough, without agreement express or implied, to discharge the old firm: *Harris v. Farwell* (15 Beav. 31). These deposit notes are not "securities," but...simply acknowledgments of indebtedness; the acceptance of a fresh deposit note could not, therefore, operate as a change of security. The question is one of intention to release; and the evidence entirely negatives any such intention. There has been no such laches on the part of any of the claimants as to deprive them of their rights.

* * * * *

The proof against the estates of Woodhead and Joseph Holmes was not enough to deprive the claimants of the rights which they had against

the estate of the testator. The effect of the notices given when the new partners were taken, and of the subsequent dealings of the depositors with the new firm, was to substitute the liability of all the four members of the new firm for the liability of the two members of the old firm. There can be no novation without an intention to novate on the part of the creditor. The case is on all fours with *Harris v. Farwell*¹.

HALL, V.C. As regards the second and third of these claims, being the cases in which new deposit notes were given, I think the contention is established that the new partners only were liable. It has been argued that the giving up of the old notes and the receiving the new ones was a matter of form only; and that the original liability was intended to and did continue notwithstanding. But the circular stated that the new partners would carry on the business in the old name, and the new notes were given after such new partners had become the sole surviving members of the firm. Accordingly the undertaking of the liabilities of the old firm by the new members of the firm supplied a good consideration for giving up the claim upon the old partners. That being so, it is quite impossible to hold that in these cases the old liability continued; a new liability was substituted for the original liability.

The case of Miss Amiel is somewhat different from the other two cases. After the death of John Holmes she continued to receive interest from Exley (the survivor of the two partners originally liable) and the two new partners, and after Exley's death from the two new partners alone; that is, from two persons not originally liable to her. The new partners being treated, and treating themselves as liable to satisfy these claims, they cannot, I think, be considered as paying interest on behalf of the representatives of John Holmes, the deceased partner, but must be taken to have paid it entirely on their own account.

Moreover, the proof in the bankruptcy was in all three cases solely against the estates of Woodhead and Joseph Holmes; and was not, as in *Harris v. Farwell*, "for money had and received to and for the use of" the creditors, but was for "money lent and advanced" to the bankrupts. This is, in my opinion, quite sufficient to shew, without any renewal of the deposit notes, that there was an acceptance of the liability of the bankrupts, and a release of the former members of the firm. This distinguishes the case from *Harris v. Farwell*.

I must hold that Miss Amiel, by her receipt of interest and her mode of proof against the bankrupts' estate, has accepted them as her debtors in lieu of the testator², and consequently that her claims, as well as the two others, must be disallowed.

¹ [EDITOR'S NOTE. In which case it was held by Lord Romilly, M.R., that the fact of taking a new security (e.g., a bill of exchange) from the new firm is not of itself sufficient to discharge a retiring partner; there must also be an agreement—express or implied—to discharge him. The new security will be consideration for that agreement. As to what may be sufficient evidence of such an agreement for substitution of liability, see *Kirwan v. Kirwan* (2 Cr. & M. 617).]

² [On the principle of election; the testator and the bankrupts not having been jointly liable to the creditor, and the creditor therefore being bound to choose which of the parties she would hold liable. Note by Mr Finch.]

SECTION III

BY IMPOSSIBILITY

KRELL v. HENRY.

COURT OF APPEAL.

L.R. [1903] 2 K.B. 740.

[Impossibility of Performance.]

THE plaintiff, Paul Krell, sued the defendant, C. S. Henry, for 50*l.*; being the balance of a sum of 75*l.*, for which the defendant had agreed to hire a flat at 56A, Pall Mall, for the purpose of viewing the processions to be held on June 26th and 27th, in connection with the coronation of His Majesty. The defendant denied his liability; and counter-claimed for the return of the sum of 25*l.*, which had been paid as a deposit; on the ground that, the processions not having taken place owing to the serious illness of the King, there had been a total failure of consideration for the contract entered into by him. Darling, J., held that there was in the contract an implied condition that the procession should take place. He gave judgment for defendant on the claim and counterclaim. The plaintiff appealed.

Spencer Bower, K.C., for plaintiff....In *Turner v. Goldsmith* (L.R. [1891] 1 Q.B. 544), where the defendant contracted to employ the plaintiff for a fixed term as agent in a business which he, the defendant, ultimately abandoned before the expiration of the term, it was held that there was no implied condition for the continued existence of the business, and accordingly the plaintiff was held entitled to damages for breach of contract. And that was so although part of the *res* had perished; here no part of the *res* had perished [and performance was quite possible]. The rule is that the Court will not imply any condition in a contract except in case of absolute necessity (*Hamlyn v. Wood* (L.R. [1891] 2 Q.B. 488))....Money was paid before the day specified; which shews that the passing of the procession did not really constitute the basis of the contract, except in a popular sense. The truth is that each party had an expectation, no doubt; but the position is simply this; one says, "Will you take the room?" and the other says, "Yes." That is all. The contract did nothing more than give the defendant the opportunity of seeing whatever might be going on upon the days mentioned....[The defendant took the risk of there being no procession.]...

* * * * * * *

VAUGHAN WILLIAMS, L.J....*Taylor v. Caldwell* (3 B. & S. 826) makes it clear that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless (when the time for the fulfilment of the contract arrived) some particular specified thing continued to exist—so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done—there (in the absence of any express or implied warranty that the thing shall exist) the contract is not to be considered a positive contract but as subject to an implied

condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with obligationes de certo corpore. Whatever may have been the limits of the Roman law the case of *Nickoll v. Ashton* (L.R. [1901] 2 K.B. 126) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance....

In this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed, parol evidence is admissible to shew that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. When once this is established, I see no difficulty whatever in the case. It is not essential to the application of the principle of *Taylor v. Caldwell* that the direct subject of the contract should fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance fails to be in existence at that time. In the present case the condition which fails and prevents the achievement of that which was, in the contemplation of both parties, the foundation of the contract, is not expressly mentioned either as a condition of the contract or the purpose of it. But I think that the principle of *Taylor v. Caldwell* ought to be applied. This disposes of the plaintiff's claim for 50*l.* unpaid balance of the price agreed to be paid for the use of the rooms. The defendant at one time set up a cross-claim for the return of the 25*l.* he paid at the date of the contract. As that claim is now withdrawn it is unnecessary to say anything about it.

The facts of this case do not bring it within the principle, laid down in *Stubbs v. Holywell Ry Co.* (L.R. 2 Ex. 311); that in the case of contracts falling directly within *Taylor v. Caldwell* the subsequent impossibility does not affect rights already acquired. Because the defendant had the whole of June 24th to pay the balance; and the public announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day.

Appeal dismissed.

[EDITOR'S NOTE. "In *Krell v. Henry*, it does not appear whether there was any express contract as to when the money was payable. If payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back: and it could be sued for." *Per* Channell, J., approved by Lord Halsbury, L.C. (L.R. [1903] 2 K.B. at p. 764).]

CHANDLER v. WEBSTER.

COURT OF APPEAL.

L.R. [1904] 1 K.B. 493.

[Rights accrued before Impossibility.]

THE action was brought by the plaintiff to recover a sum of 100*l.*, paid by him to the defendant, as on a total failure of consideration. The defendant counterclaimed for 41*l.* 15*s.*

The defendant had agreed to let a room in Pall Mall to the plaintiff for the purpose of viewing the procession on the coronation of the King on June 26th, 1902, at the price of 141*l.* 15*s.* A memorandum sent by defendant to plaintiff was: "To first-floor room and use of ante-room at back, at 7 Pall Mall, W., to view the first coronation procession on June 26th, 1902, 157*l.* 10*s.*, less 10 per cent. 15*l.* 15*s.*—141*l.* 15*s.*" The defendant repeatedly wrote to the plaintiff asserting that by the agreement the price of the room was immediately payable, and demanding payment of it. The plaintiff, however, never denied, in substance, that the price of the room was payable before the procession. The plaintiff had hired the room for the purpose of letting it to a customer; but the customer did not ultimately want the room. On June 10th, 1902, the plaintiff wrote to the defendant: "I beg to confirm my purchase of the first-floor room of the Electric Lighting Board at 7, Pall Mall, to view the procession on Thursday, June 26th, for the sum of 141*l.* 15*s.* which amount is now due. I shall be obliged if you will take the room on sale, and I authorize you to sell separate seats in the room, for which I will erect a stand. If the seats thus sold in the ordinary way of business do not realize the above amount by June 26th, I agree to pay you the balance to make up such amount of 141*l.* 15*s.*" On June 19th the plaintiff paid the defendant 100*l.* on account. Subsequently it became impossible that the procession should take place on account of the illness of the King.

Wright, J., held that the plaintiff was not entitled to recover the 100*l.* which he had paid; and that, on the construction of the letter of June 10th, it appeared that the balance was not payable until after the procession, and consequently the defendant was not entitled to recover on the counter-claim. [Both parties appealed.]

* * * * *

Spencer Bower, K.C., for plaintiff. The construction put by the learned judge on the letter of June 10th was correct, and therefore the appeal must fail. With reference to the cross-appeal, this case is simply one of a total failure of consideration; and therefore the plaintiff is entitled to recover back the 100*l.* which he has paid, and *a fortiori* cannot be bound to pay the balance. The doctrine of *Taylor v. Caldwell* (3 B. & S. 826) does not apply to the present case. The consideration for which the parties here contracted was the use of a room from which the procession could be viewed. If there was no such procession, the whole consideration failed; and the plaintiff therefore was not bound to pay for the room; and, having paid part of the price, is entitled to recover it back. There

is nothing really in the correspondence to shew that by the terms of the contract the price of the room was payable before the procession had taken place. [The defendant had incurred no expense and done nothing in the way of performance; so that *Blakeley v. Muller* (L.R. [1903] 2 K.B. 760) and *Civil Service v. G.S.N. Co.* (*Ibid.* 756) are distinguishable.]

COLLINS, M.R....The letter of June 10th appears to me to begin with a clear admission that the whole 141*l.* 15*s.* was then due; and then to suggest, merely by way of indulgence, an opportunity of letting seats.. without any waiver of the rights of the defendant under the original contract....That being so, the defendant is entitled to succeed on the counter-claim....

ROMER, L.J....Where there is an agreement which is based on the assumption by both parties that a certain event will in the future take place and that event is the foundation of the contract, and, through no default by either party and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that, before the time fixed for that event, it is ascertained that it cannot take place—the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement. But, except in cases where the contract can be treated as rescinded *ab initio*, any payment previously made, and any legal right previously accrued according to the terms of the agreement, will not be disturbed. The present case appears to me to come within that proposition. The agreement here was such that, when it turned out that the procession could not take place, both the parties were thenceforth free from all further obligations under the contract. In my opinion, it was not a contract which could then be treated as rescinded *ab initio*. That being so, any legal right which had previously accrued to either party remained in force. One of those rights was that of the defendant to payment of the sum of 141*l.* 15*s.* in pursuance of the agreement.

Defendant's appeal allowed; plaintiff's appeal dismissed.

SECTION IV

DISCHARGE OF CONTRACT BY BREACH

SIR ANTHONY MAIN'S CASE.

QUEEN'S BENCH. 1596.

5 COKE, 20 b

[Promisor makes it impossible for himself to fulfil his promise.]

SIR ANTHONY MAIN did lease certain land to Scot for 21 years by indenture; and covenanted that at any time during the life of Scot, upon surrender of his lease, Sir Anthony, &c., would make a new lease during the residue of the years, and bound himself to perform the covenants. And now in debt on the said obligation by Scot against Sir Anthony, he pleaded that Scot did not surrender. To which Scot replied that after

the said lease Sir Anthony had accepted a fine *sur conusans de droit come ceo*, &c., and by the same fine granted and rendered the land to the conusee for 80 years. Upon which the defendant did demur in law. And it was adjudged for the plaintiff. And in this case three points were resolved:

1. That Sir Anthony Main had broken his covenant without any surrender made. For, by the said fine levied by him for 80 years, he had disabled himself either to take a surrender or to make a new lease; and the law will not enforce any one to do a thing which will be vain and fruitless. *Lex neminem cogit ad vana seu inutilia peragenda*; but it would be vain to compel him to make a surrender to him who cannot take it. And although the lessee in this case, by the words of the indenture, ought to do the first act, *scil.* to make the surrender, yet when the lessor hath disabled himself, not only to take the surrender, but also to make a new lease according to the covenant, for this cause the lessor's covenant is broken without any surrender made. *Vide* 32 E. 3, Barre 264, and 21 E. 4, 55a. If you are bound to enfeof me of the manor of D. before such a feast, if you make a feoffment of the said manor to another before the said feast, you have forfeited your obligation, although you repurchase the land again before the feast; because you were once disabled to make the feoffment. And therewith agreeth Temp. E. 1, Covenant 29. A man leases a manor for years, and the lessee covenants to keep the houses of the manor and as much as was in the manor in as good plight as he found them, during the term; the lessee committed waste in the houses, and in cutting of oaks; the lessor brought an action of covenant before the end of the term for the oaks, because for them it was impossible that the covenant should be performed; otherwise it is of the houses. And therewith agree F.N.B. 145 K. and 13 E. 3, Tit. Covenant 2.

2. It was resolved, if a man seised of lands in fee covenants to enfeof J.S. of them upon request, and afterwards he makes a feoffment in fee of the said lands; now in this case J.S. shall have an action of covenant without request.

3. It was resolved that, in the case at bar, if the said term of 80 years were but an interest of the future term, so that Scot notwithstanding that might make the surrender¹, yet in such case Scot should have an action of covenant without making any surrender. For true it is that he may surrender; but also true it is that Sir Anthony after such surrender cannot make the new lease, which was the effect that the surrender should produce. And therefore, inasmuch as the lessor hath disabled himself to make a new lease, which is the effect and end of the surrender and that which he ought to do on his part, the lessee shall not be enforced to make the surrender, which is the first thing to be done on his part. For by the surrender he would lose his old term without a possibility of having the new according to the lessor's covenant. And therewith

¹ [EDITOR'S NOTE. A lease at common law gives the lessee no *estate*, but only a right of entry, until he actually takes possession of the land; this right is called his *interesse termini*; i.e. his interest in the term of years. The second termor's mere right of entry would leave Sir Anthony still the immediate reversioner of Scot and consequently capable of receiving a surrender from him.]

agreeth 14 H. 4, 19a. J., parson of the church of G., was bound in an obligation of 100*l.* to the Prior of E.; the condition was that if the parson resign his church within certain time to the Prior for a certain pension as they could agree, that then the obligation should be void; and afterwards and within the time the Prior and parson agreed of a pension of 5*l.* yet the parson did refuse to resign. And the opinion of the whole court was that, although they had agreed of the pension, yet the parson is not bound to resign until he be sure of the pension; and that he cannot be without deed. And therefore in such case the parson is not obliged to resign until the Prior hath tendered him a deed of the said pension by which he might be sure of it.

MAVOR, ASSIGNEE OF W. H. PYNE, *v.* PYNE.

COMMON PLEAS. 1825.

3 BINGHAM 288.

[*Repudiation—Unperformed contract—Right to sue.*]

THE plaintiff was assignee of a bankrupt who was author of a work called "*The History of the Royal Residences*," which he published by subscription, in twenty-four numbers, at one guinea a number. The numbers were left at the publisher's house ready for delivery monthly. Each subscriber received his numbers at the house. The whole twenty-four numbers were completed. The defendant only took away eight numbers, although he was informed that the remainder were ready for him.

The jury found a verdict for the plaintiff.

Vaughan, Serjt. moved for a nonsuit on several grounds....Thirdly, that the assignees could not sue the defendant till the bankrupt's part of the contract was performed by the delivery of the whole twenty-four numbers. Fourthly, that the contract not having been reduced to writing was void by the Statute of Frauds, as the work was not to be completed within a year. *Boydell v. Drummond* (11 East 142).

BEST, C.J....To the objection that this action could not be maintained, the bankrupt not having performed his part of the contract, the short answer is, that the defendant put an end to the contract. Consequently the plaintiff was entitled to recover for the amount of what he had performed. If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received¹...The defendant broke his bargain in not taking the other numbers; and was liable to pay for those he had. The verdict is only for the eight that were received by him.

Boydell v. Drummond shews that the Statute of Frauds will prevent plaintiff's recovering on the original contract; it was not in writing, and not to be performed within a year. But neither the statute nor the case shews that plaintiff is not to be paid for numbers actually received by defendant. In *Boydell v. Drummond*, the defendant had paid for all the

¹ [EDITOR'S NOTE. By my retention of the ten a new contract arises.]

numbers of the work subscribed for that he had received; and the question was, whether the executory part of the contract was binding, and the defendant bound to take any pay for the residue of the work. The reasoning of the judges in that case is against the argument of the defendant's counsel. They consider a subscription of this sort as a divisible contract. The meaning of the contracting parties, when they say *twenty-four numbers, at one guinea each number*, is, that the publisher shall be paid as the numbers come out; not that he is to wait until the work is complete before he receives any money. Many of the most beautiful works which the public now possess, could never have been brought out unless the publishers had been paid as the numbers were delivered.

If the defendant had not put an end to the contract, I should have no difficulty in saying, that the bankrupt was entitled to be paid one guinea by him for every number that he received.

Judgment for plaintiff.

PLANCHÉ v. COLBURN AND ANOTHER.

COMMON PLEAS. 1831.

8 BINGHAM 14.

[Impossibility created by promisor during performance.]

THE defendants commenced a periodical publication, under the name of "The Juvenile Library," and engaged the plaintiff to write for it a volume upon Costume and Ancient Armour for 100*l*. He completed a considerable portion of the work; performed a journey to inspect ancient armour, and made drawings therefrom; but never tendered his performance to the defendants, they having finally abandoned the publication of "The Juvenile Library," upon the ill success of the early numbers of the work. An attempt was made to shew that the plaintiff had entered into a new contract. Tindal, C.J., left it to the jury to say whether the work had been abandoned by the defendants, and whether the plaintiff had entered into any new contract. A verdict was found for him, with 50*l*. damages.

Spankie, Serjt., moved to set it aside, on the ground that the plaintiff could not recover on the special contract, for want of having tendered the work pursuant to the contract; and he could not resort to the common counts for work and labour, when he was bound by the special contract to deliver the work. If he had delivered the work, or so much of it as he had completed at the time "The Juvenile Library" was abandoned, the defendants might have turned it to account in some other way.

TINDAL, C.J....The considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author, who has engaged to write a volume of a popular nature for a juvenile class of readers, should be subject to have his writings published as a distinct work, liable to be judged of by more severe rules than would be applied to a work intended merely for children. The defendants had not only suspended, but actually put an end to, "The Juvenile Library." They had broken their contract with the plaintiff; and an attempt was

made, but quite unsuccessfully, to shew that the plaintiff had afterwards entered into a new contract to allow them to publish his book as a separate work.

When a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*: part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labour.

Judgment for plaintiff.

[EDITOR'S NOTE. In *Clay v. Yate* (1 H. & N. 73) a printer had printed part of a book, but refused to proceed with the later part, as he found this to be libellous. It was held that he nevertheless could recover for the part previously printed. Martin, B., said, "As soon as a printer discovers the objectionable nature of his work, he ought to stop. As the work was commenced in ignorance that a part of it was unlawful, a duty arises to pay the plaintiff for that part which was performed." Cf. *Gale v. Leckie* (2 Starkie, 107).]

WITHERS v. REYNOLDS.

KING'S BENCH. 1831.

2 B. & Ad 882.

[Delivery by Instalments—Breach—Discharge.]

ASSUMPSIT for not delivering straw to the plaintiff pursuant to agreement. The agreement was as follows: "John Reynolds undertakes and agrees to supply Joseph Withers with wheat-straw of good quality sufficient for his use as a stable-keeper, and delivered on his premises till June 24th, 1830, at the sum of thirty-three shillings per load of thirty-six trusses, and to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830, according to the terms of this agreement.

Joseph Withers, John Reynolds."

The straw was regularly sent in from October 20th, 1829, when this agreement was made, till the end of January 1830. At that time, the plaintiff being in arrear for several loads of straw, the defendant called upon him for the amount, and he thereupon tendered to the defendant 11l. 11s., being the price of all the straw delivered except the last load; saying that he should always keep one load in hand. The defendant objected to this; but was at length obliged to take the sum offered. He then told the plaintiff that he would send no more straw unless it was paid for on delivery; and accordingly no more was sent. On the part of the defendant it was submitted that there must be a nonsuit, inasmuch as the plaintiff, on his own shewing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord Tenterden, C.J., was of this opinion; but directed a verdict for the plaintiff, reserving the point. A rule nisi was afterwards obtained for entering a nonsuit.

Campbell, for plaintiff. Two things independent of each other were stipulated by this contract to be done by the respective parties: the

defendant was to deliver straw; the plaintiff to pay the price. No time of payment was specified. There appears nothing which could entitle the defendant to insist on receiving his money till the whole quantity of straw was delivered. Payment, then, was not a condition of the defendant's performance of his contract. His promise was given in consideration that the plaintiff promised to pay, not in consideration of performance. Even if the plaintiff was bound to pay for each load on delivery, still it does not follow that a refusal to pay for one load excused the defendant from any future performance of his contract; *Weaver v. Sessions* (6 Taunt. 154). And, according to that case, he ought at least to have shewn that he subsequently made a tender of executing his part of the agreement, which the plaintiff rejected. The defendant, therefore, upon his construction of the agreement, may be entitled to bring a cross action, but has no defence to this.

LORD TENTERDEN, C.J. By the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered....Then the only question is, whether upon the plaintiff's saying, "I will not pay for the goods on delivery," it was incumbent on the defendant to go on supplying straw. He clearly was not obliged to do so.

PARKE, J....The defendant clearly did not contemplate credit. When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him.

PATTESON, J. If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw¹. But the plaintiff here expressly refuses to pay for the loads as delivered. The defendant, therefore, is not liable for ceasing to perform his part of the contract.

Judgment for defendant.

[EDITOR'S NOTE. The authority of this case has been repeatedly recognised. It was followed in *Freeth v. Burr* (L.R. 9 C.P. 208). There, under a contract of Nov. 28 for the sale of 250 tons of pig-iron "half to be delivered in two weeks, remainder in four weeks," none was delivered until February, and only 10½ tons then; by the end of May, only 126 tons had been delivered. The plaintiff refused to pay for them, and claimed damages for breach of contract. The defendants urged that his refusal to pay had rescinded the contract. Lord Coleridge, C.J.—whose ruling was approved by the House of Lords in the *Mersey S. & I. Co. v. Naylor*—said "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to *abandon and altogether refuse* performance of the contract. The mere non-payment for the first portion of the iron contracted for, unattended by any other act on the part of the purchasers, did not put an end to the contract so as to disentitle the purchasers to maintain an action for the non-delivery of the second portion, but only gave the seller a remedy by cross-action." Non-payment is an important element, but not more.]

¹ [EDITOR'S NOTE. The question thus raised, as to the effect of a refusal to pay for one of several intended instalments, has given rise to various decisions; some of which are not easy to reconcile with others. Probably the true view is that quoted above from *Freeth v. Burr*. See also the next two cases.]

MERSEY STEEL AND IRON CO. v. NAYLOR, BENZON, & CO.

HOUSE OF LORDS. 1884.

L.R. 9 APP. CA. 434.

[*Delivery by Instalments—Repudiation.*]

[THE Mersey Company sold to Naylor, Benzon, & Co. 5000 tons of steel blooms; 1000 tons to be delivered each month, beginning in January, payment within three days after receipt of shipping documents. Only 331 tons of the January instalment were delivered in that month; they were paid for. In February, 471 tons further were delivered. The Mersey Company became insolvent; and the purchasers, under an error of law, refused to pay at present for what had not yet been paid for. The vendors gave notice that they regarded this refusal as a breach of contract, releasing them from further performance. The purchasers declared themselves to be willing to accept future deliveries, but entitled to damages for the non-delivery in January. The liquidator of the Mersey Company brought an action for the price of what had been delivered; but the defendants counter-claimed for the non-delivery. Lord Coleridge, C.J. held that the defendants were bound to pay; and could have no claim for damages, as their refusal of payment was a breach that entitled the vendors to rescind the contract. The Court of Appeal reversed this decision. The plaintiffs appealed.]

Cohen, Q.C., for plaintiffs. A contract of the kind now sued on is made on the assumption that the parcel already delivered will be paid for punctually, and in time to put the manufacturer in funds to provide for the manufacture and delivery of the next parcel. If either party to such a contract breaks it in a material part the other is absolved from performing his part: *Hoare v. Rennie* (5 H. & N. 19); *Honck v. Muller* (L.R. 7 Q.B.D. 92). Payment for one parcel is a condition precedent to the delivery of the next. If the purchaser is solvent he ought to pay; if insolvent it is unjust that he should have delivery, and the seller is justified in refusing to deliver. The Court of Appeal held that, to set free the vendor, the purchaser must evince an intention not to perform the rest of the contract. That cannot be; it is enough if one party refuses to perform a material part—in other words, if the contract originally made is substantially different from the contract which the purchaser seeks to enforce upon the vendor. The law gives no damages or remedy for the breach of a contract to pay money; not even interest, unless stipulated or recoverable under the statute. Therefore the Courts should be slow to compel the vendor to deliver without payment....The rule in equity that time is not of the essence of the contract does not apply in mercantile contracts (4 C.P.D. at p. 249)....

* * * * *

LORD SELBORNE, L.C....You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as

would amount to a rescission if he had the power to rescind; and whether the other party may accept it as a reason for not performing his part....

LORD BLACKBURN....So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it; and for a very good reason, viz. that the price had risen high above the contract price. There was a statement that, for reasons which they thought sufficient, they were not willing to pay for the iron at present. If that statement had been an absolute refusal to pay, saying, "Because we have power to do wrong, we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury, for them to say whether it would not amount to a refusal to go on with the contract in future. For a man might reasonably so consider it. But there is nothing of that kind here; it was a *bonâ fide* statement and a very plausible statement....When there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay; but it was not a part of the contract that went to the root of the consideration in the matter. I repeatedly asked Mr Cohen whether he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract; and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract....

LORD BRAMWELL....Whether, if they had positively refused to pay for that *already* delivered, it would have given any justification to the company or the liquidator for refusing to go on with the contract, it is not necessary for me to say at the present moment. I do not say that it would not. But if they had positively refused to pay for all which might be *subsequently* delivered, it would undoubtedly be an answer; upon the authority of *Withers v. Reynolds* (*supra*, p. 386).

Appeal dismissed.

[EDITOR'S NOTE. In *Ebbw Vale Co. Ltd. v. Blaiva Ltd* (6 Commercial Co. 33) the contract was for the sale of steel bars; to be delivered in monthly quantities, and paid for in fourteen days from delivery. To obviate the effect of the *Mersey Steel Case*, a clause stipulated: "All payments to be made on due date as a condition precedent to future deliveries." Hence, on a mere default in payment, the Court of Appeal held the vendor to be entitled to rescind and refuse further deliveries.

For breaches too small to justify repudiation see *Rhymney v. Brecon* (69 L.J.R. Ch. 813) and *Hosking v. Pahang* (8 T.L.R. 125.)

NORRINGTON v. WRIGHT.

SUPREME COURT OF U.S.A. 1885.

115 U.S. 188.

[NORRINGTON, of London, agreed to sell to Wright, of Philadelphia, 5000 tons of iron rails, for shipment from a European port or ports "at the rate of about 1000 tons per month, beginning in February 1880, but whole contract to be shipped before August 1st, 1880....Settlement, cash on presentation of bills...." Norrington shipped only 400 tons in

February; 885 in March; 1571 in April; 850 in May; 1000 in June; and 300 in July. The February shipment was accepted and paid for. But it was not until May that Wright learned what amounts had been shipped in March and April; and he then gave written notice that he would not accept those shipments, they not being in accordance with the contract. The market price of iron was constantly falling.

Norrington brought an action for non-acceptance; but judgment was given for defendant. The plaintiff appealed.]

Dickson, for plaintiff. A partial failure in the performance of a divisible contract does not justify the other party in refusing to go on with it. If the covenant broken goes to the entire consideration, the object of the contract is defeated; but if capable of compensation, the only remedy is in damages....

GRAY, J....In the contracts of merchants, time is of the essence.... A statement descriptive of the subject matter, or of some material incident such as the time or place of shipment is ordinarily to be regarded as...a condition precedent, upon the non-performance of which the party aggrieved may repudiate the whole contract....

The contract sued on...is not one for the sale of a specific lot of goods, identified by independent circumstances (such as all those deposited in a certain warehouse or to be shipped in a particular vessel)...in which case the mention of the quantity, accompanied by the qualification of "about" or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required....The contract before us comes within the general rule;...no such independent circumstances are referred to, and the engagement is to furnish goods of a certain character to a certain amount. The quantity specified is material and governs the contract. The seller...has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right, to rescind the whole contract, that he would have had if it had been agreed that all the goods should have been delivered at once....The plaintiff...was bound to show such performance on his part as entitled him to demand performance on the defendant's part; and, having failed to do so, cannot maintain this action....

...The plaintiff relied greatly on *Mersey Co. v. Naylor*. But the point there decided was that the failure of the buyer to pay¹ for the first instalment of the goods upon delivery does not (unless the circumstances evince an intention on his part to be no longer bound by the contract) entitle the seller to rescind the contract....The grounds of the decision ...are applicable only to the case of a failure of the buyer to pay for—and not to that of a failure of the seller to deliver—the first instalment....

Judgment affirmed.

¹ [EDITOR'S NOTE. In England, by s. 10 (1) of the Sale of Goods Act, 1893. "Unless a different intention appears by the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale."]

[EDITOR'S NOTE. This case was confirmed in the same Court in *Cleveland Rolling Mill Co. v. Rhodes* (121 U.S.A. 255); where all the pig-iron to be made from 14,000 tons of ore was bought, to be shipped in instalments; and the final shipments to be made "on the opening of navigation in 1881 or as near that opening as possible." About seven-eighths were shipped duly; but the final eighth not until nearly two months after the close of winter had reopened navigation. The company refused to accept it. The Court held them to have been justified in refusing; and said, "When a merchant agrees to sell and ship...a certain number of tons of pig-iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement. The seller does not perform his agreement by shipping part at the time appointed and the rest from time to time afterwards; and the buyer is not bound to accept any part of the iron so shipped."

The student must remember that these two American decisions are not binding upon English courts; and therefore do not authoritatively settle the question whether non-delivery of an instalment can amount to a breach of a contract of sale when vendor does intend to go on delivering.]

FROST v. KNIGHT.

EXCHEQUER CHAMBER. 1872.

L.R. 7 EXCH. 111.

[*Repudiation before condition satisfied.*]

[THE action was for breach of promise of marriage. The promise was to marry the plaintiff on the death of the defendant's father. Whilst the father was still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement. Thereupon the plaintiff, without waiting for the father's death, at once brought an action. The plaintiff obtained a verdict; but the defendant moved to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event, no claim for performance could be made and no action for breach of the contract be maintained. A majority of the Court of Exchequer accepted this contention; Martin, B., dissenting. The plaintiff appealed.

Powell, Q.C., for defendant....An unconditional promise to marry is necessarily broken by marrying another person. With a promise like the present this is not so clear. But, assuming that an actual marriage to another woman would be a breach, still no breach is shewn in the present case. The defendant's refusal—he being still unmarried—has created no obstacle to performance when the time arrives. Contracts of this kind are of a very different character from mercantile contracts; and are not construed strictly against, but strictly in favour of those who are to be bound by them; *Box v. Day* (1 Wils. 59). All the cases relied upon for the plaintiff are cases of mercantile contracts, in which something was to be done by the plaintiff before the day for the defendant's performance.

The impossibility of assessing the damage is decisive against the maintenance of the action.]

* * * * *

COCKBURN, C.J....The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance¹. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it. In such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time; subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss².

We should have had no difficulty in applying the principle in *Hochster v. De la Tour* (2 E. & B. 678) to the present case, were it not for the difference which undoubtedly exists—viz. that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency (namely, the death of the defendant's father during the lifetime of the contracting parties). It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself, before the time of performance arrives; but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise....We are of opinion that, notwithstanding the distinguishing circumstance, this case falls within the principle; and that, consequently, the present action is well brought.

The considerations on which *Hochster v. De la Tour* is founded are—that the announcement by the contracting party of his intention not to fulfil the contract amounts to a breach; and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time. By an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

It is true that there can be no actual breach of a contract by non-performance so long as the time for performance has not yet arrived.

¹ [EDITOR'S NOTE. For "repudiation is a nullity unless accepted by the other party to the contract" (*per* Collins, M.R., 18 T.L.R. 716).]

² [EDITOR'S NOTE. E.g. if a purchaser's repudiation leads the vendor thus to rescind a contract for the sale of goods, that vendor must not hold on in a falling market but resell the goods with reasonable promptitude. So, in the converse case, a rescinding purchaser must not wait to watch a rising market.]

But, on the other hand, there is—and *Hochster v. De la Tour* proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has...a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*; and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract....The eventual non-performance may therefore, by anticipation, be treated as a cause of action; and damages be assessed and recovered in respect of it, though the time for performance may yet be remote¹....In assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done, or, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

The foregoing considerations apply to the case of a contract the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time; and we are, therefore, of opinion that the principle of *Hochster v. De la Tour* is equally applicable to such a case as the present.

The law as settled by *Hochster v. De la Tour* and *Danube and Black Sea Company v. Xenos* (13 C.B. N.S. 825) is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties....To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury; by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that the desire of marrying and the happiness to be expected from it diminish with advancing years, and, therefore, that when by the terms of the contract marriage is only to take place at a remote time, the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished;

¹ [EDITOR'S NOTE. As to the mode of assessing damages, and the date to be adopted as the basis of assessment, in cases of an anticipatory breach of contract of sale before the arrival of the contractual time for delivery, see *Melachrino v. Nickoll* (36 T.L.R. 143) and *Millet v. Van Heek* (L.R. [1921] 1 K.B. 373).]

and that, consequently, an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We think that, in estimating the amount of injury done, if the contract were broken when the time for marrying had arrived, the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account; and not merely the age of the parties and the then existing value of the marriage.... No one can doubt that, morally speaking, a party who determines to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise has come. The giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates, the injury to the party wronged.

It has been urged that there must be great difficulty in thus assessing damages prospectively. But this must always be more or less the case whenever the principle of *Hochster v. De la Tour* comes to be applied. It would equally exist where one of the parties, by marrying another person, gave rise, as in the case of *Short v. Stone* (8 Q.B. 358), to an immediate right of action....

BYLES, J....An absolute unconditional renunciation of a contract before the time of performance amounts to a breach, though only at the election of the promisee.

Judgment reversed.

JOHNSTONE v. MILLING.

COURT OF APPEAL. 1886.

L.R. 16 Q.B.D. 460.

[*Repudiation of covenant before time for performance.*]

THE action was, after issue joined, remitted to the county court for trial.

The facts with regard to the plaintiff's claim are immaterial to this report.

The facts with regard to the defendant's counter-claim were as follows: In June, 1881, premises, of which the plaintiff was owner, subject to certain mortgages, were demised to the defendant by the plaintiff and his mortgagees for twenty-one years from May 12, 1880, subject to a proviso for sooner determination of the same the rent being by the terms of the lease made payable to the plaintiff, until the mortgagees gave notice to the lessee in writing to pay it to them, and, upon such notice being given, to the mortgagees. The lease contained a covenant by the plaintiff that after the expiration of the first four years of the term the plaintiff would, on receipt from the lessee of six calendar months' notice in writing requiring him so to do, forthwith proceed to rebuild the premises within the period and in the manner specified by the covenant. It was provided that the lessee might at the end of the first four, seven, or fourteen years of the lease determine the same by giving, to the person for the time being in the receipt of the rent, six calendar months' notice in writing of his intention so to do.

The defendant gave the requisite notice to determine the lease at the end of the first four years. During his tenancy he spoke to the plaintiff constantly about getting the money to rebuild the premises. The plaintiff said he was unable to do so; his declaration of inability to get the money for rebuilding extended over the last two years and a half of the defendant's tenancy. He made it constantly, both before and after the expiration of the four years; and in consequence of such declaration the defendant gave notice to determine the lease. The defendant continued to occupy the premises for about three months after the determination of the lease, paying rent to the mortgagees. After the lapse of the lease the plaintiff voluntarily told him that he was utterly unable to find the money; but the defendant continued the tenancy on the chance of the plaintiff's getting the money.

The county court judge found that the plaintiff had been unable to find the money to rebuild the premises; that the plaintiff, both before and after the surrender of the lease, told the defendant that he was unable and would be unable to find the money for rebuilding the premises; that the defendant, in consequence of the plaintiff's inability to find the money, surrendered the lease; and that the defendant suffered damage by such surrender. The defendant's counsel submitted on those findings that the defendant was entitled to a verdict on the counter-claim. The county court judge, however, held the contrary, and found a verdict both on the claim and on the counter-claim for the plaintiff, and entered judgment accordingly. A new trial was ordered by the Queen's Bench Division. The plaintiff appealed.

Brooke Little, for defendant. A promisor's positive announcement that he will be unable to perform the contract when the time for performance arrives, is an announcement of intention not to perform.... The defendant was not bound to give notice to the lessor to do what he had already said he should not be able to do. Nor was he bound to continue tenant until the time for performance arrived. The damages would have been much greater if he had continued, so his giving notice to determine the term was really for the benefit of the lessor. There is no reason why the doctrine of anticipatory breach should be confined to cases where the *whole* contract can be rescinded upon renunciation....

LORD ESHER, M.R. It is quite clear that there was no breach of the covenant, in the ordinary sense of the term; because no notice to rebuild had been given, and the lease was determined before the time at which the obligation to rebuild under the covenant would have accrued. The lease being so put an end to, it is quite clear that the lessee could not sue the lessor for breach of the covenant. That being so, the cause of action is thus shaped on behalf of the defendant:—it is alleged that a breach of the contract was committed by the plaintiff before the end of the four years, inasmuch as he had declared that he would be unable to find the money for rebuilding when the time came. It is insisted that ...the expressions used by the plaintiff were such that the defendant was entitled to treat them as equivalent to a repudiation of the contract. It is accordingly contended that there was a breach of the contract by anticipation (before the time for its performance arrived) for which the

defendant was entitled to damages; and that the fact that the defendant afterwards exercised his option of determining the lease is immaterial, for in so doing he only acted for the benefit of the landlord in order to minimize the damages arising from his repudiation of the contract. The lessor did, a considerable time before the expiration of the four years, repeatedly say that he would be unable to find the money for rebuilding; and the judge finds that in consequence the defendant surrendered the lease. It appears, however, from the evidence that he did not at once throw up the lease; but waited till the last six months of the four years and then gave the requisite notice to determine the term. Now on what principle can it be that the defendant had a right of action on the covenant?...The defendant has recourse to the doctrine of *Hochster v. De la Tour* (2 E. & B. 678),...that a renunciation of a contract by one party before the time for performance arrives, does not, by itself, amount to a breach of contract; but may be so adopted by the other party as a rescission of the contract as to give an immediate right of action....That other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. He must elect which course he will pursue. Such appears to me to be the only doctrine recognised by the law with regard to anticipatory breach of contract. We are asked, as it seems to me, by the counsel for the defendant to lay down a new principle, but I do not think we can do so consistently with the established doctrines of law on the subject....

...The contract made between the plaintiff and the defendant was the whole lease. The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, an anticipatory breach could not entitle him to do so. Therefore the defendant could not elect to put an end to the contract in consequence of what the plaintiff stated. But, whether he could do so or not, in fact he did not. He did not renounce the lease or give up the premises. He did not do any act which affected the existence of the contract. He made no declaration of intention to treat it as rescinded except for the purpose of bringing his action upon it. On the contrary, at the time fixed by the contract he gave the requisite notice to determine the lease....The judgment of the county court judge was correct.

COTTON, L.J.... The law is [*Frost v. Knight* (*supra*, p. 391)] that when one party has done an act which amounts to a wrongful renunciation of the contract and the other has acted upon it as such, there is a cause of action in respect thereof; but, when the other has not done so, then both the parties (as well he who has attempted to renounce the contract as he who asserts its existence) are entitled to the benefit of its provisions.

But I can find no case which shews that the doctrine in question applies to the renunciation of one particular covenant or stipulation in a contract (such as a lease) which contains many¹....However that may be, we have first to arrive at the conclusion that there was a renunciation of the contract. The county court judge...does not find that the plaintiff renounced the contract; and, that being so, we ought not, I think, to put that construction on what he said. It would seem from the defendant's own evidence that he himself did not so understand the plaintiff's statements; for he says that he continued the tenancy after the lease expired on the chance of the plaintiff's getting the money. The defendant appears to have thought it on the whole the best course to act on the contract; not to treat it as at an end, but to give notice under it to determine the lease before the time arrived at which the plaintiff's obligation to rebuild was to arise. There was nothing amounting to a renunciation of the contract by the plaintiff; and, if there were, the defendant did not adopt it but treated the contract as still existing.

BOWEN, L.J....It has been decided in *Surplice v. Farnsworth* (7 M. & G. 576), that a tenant could not throw up his tenancy on the breach of a stipulation that the landlord should put the premises in repair. No one ever yet heard of an attempt to put an end to a lease in respect of a breach of covenant; except in cases where the term was made dependent upon the performance of the covenant as a condition. I very much doubt whether the doctrine of *Hochster v. De la Tour* is applicable in such a case as this, between lessor and lessee. Apart, however, from this question, I think that the Court below...ought not to have treated what the plaintiff said as amounting to a renunciation of the contract within the doctrine. Further, assuming that what the plaintiff said was a renunciation of the contract, there does not seem to me to be a tittle of evidence to shew that the defendant ever elected to treat it as such. And all reason and authority shew that he must so elect to treat it, in order that it may constitute a breach of the contract.

Appeal allowed.

[EDITOR'S NOTE. This decision was followed by the Court of Appeal in *Rhymney Railway v. Brecon* (69 L.J.R. Ch. 811).

In cases where a contract is rescinded upon repudiation, the circumstances sometimes afford evidence (e.g. from the rescinder's retention of that instalment of goods which has been delivered) of an implied new contract to pay the repudiator for such benefit as has been received—a *quantum valuit*. Yet his completing the building, which the repudiator left unfinished, would not be adequate evidence; for the rescinder cannot help retaining his land, and is not bound to submit to having it encumbered by a useless framework. Cf. *Sumpter v. Hedges* (L.R. [1898] 1 Q.B. 673).

See *Byrne v. Van Tienhoven*, *supra* at p. 68, on continued refusals.]

¹ [EDITOR'S NOTE. As yet (1921) no case has been reported which would extend the doctrine of Anticipatory Breach to contracts containing many stipulations, and dispel the doubt here expressed by Cotton, L.J., and Bowen, L.J. The doctrine, therefore, probably applies only to cases where the *whole* contract can be rescinded upon repudiation.]

WARE *v.* CHAPPEL.

UPPER BENCH. 1649.

STYLE, 186.

[*Absolute Promise.*]

WARE brought an action of debt for 500*l.* against Chappel, upon an indenture of covenants between them, viz. that Ware should raise 500 soldiers, and bring them to such a port, and that Chappel should find shipping and victuals for them to transport them to Galicia. For not providing the shipping and victuals at the time appointed, was the action brought. The defendant pleaded that the plaintiff had not raised the soldiers at that time; and to this plea the plaintiff demurs.

Windham, of counsel with the plaintiff, held that the defendant ought to have provided the shipping and victuals against the time, though the soldiers were not raised. The not raising of the soldiers can be only urged by way of mitigation of damages; and not pleaded in discharge of the breach assigned.

Yard, of counsel with the defendant, held the plea was good in bar of the action. For the covenants of each part have relation one to the other, and there is a condition precedent made by the words "to find shipping for the soldiers," so that the defendant was not to find shipping, except the plaintiff raised the soldiers; neither is there any notice given us how many soldiers he had raised.

ROLLE, C.J., held that there was no condition precedent; but that they are distinct and mutual covenants, and that there may be several actions brought for them: and it is not necessary to give notice of the number of the men raised, for the number is known to be 500; and the time for the shipping to be ready is also known by the covenants; and you have your remedy against him if he raise not the men, as he hath against you for not providing the shipping.

JERMYN and NICHOLAS, JJ., held against ROLLE for there is a precedent condition.

ASKE, J., was of ROLLE, the Chief Justice's opinion.

NICHOLAS changed his opinion, and so judgment was given for the plaintiff, except better matter were shewn.

PORDAGE *v.* COLE.

KING'S BENCH. 1669.

1 WILLIAMS' SAUNDERS, 319.

[*Independent Promises.*]

DEBT upon a specialty for 774*l.* 15*s.* The plaintiff declares that...it was agreed between the plaintiff and defendant in manner and form following (viz.) that the defendant should give to the plaintiff the sum of 775*l.* for all his lands, with a house called *Ashmole-house* thereunto belonging, with the brewing vessels remaining in the said house, and with the malt-mill and wheelbarrow; and that in pursuance of the said agreement, the defendant had given to the plaintiff 5*s.* as an earnest; and it was by the said writing further agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff the residue of the said sum of 775*l.* a week after the feast of St John the Baptist then next following

(all other movables, with the corn upon the ground, except). And although the defendant has paid five shillings, parcel, &c., yet the said defendant, although often requested, has not paid the residue....The defendant prays oyer of the specialty, which is entered *in hæc verba*, to wit: "11 May, 1668. It is agreed between Doctor John Portage and Bassett Cole, esquire, that the said Bassett Cole shall give unto the said doctor 775*l.* for all his lands, with Ashmole-house thereunto belonging, with the brewing-vessels as they are now remaining in the said house, and with the malt-mill and wheelbarrow. In-witness whereof we do put our hands and seals: mutually given as earnest in performance of this 5*s.*; the money to be paid before Midsummer, 1668; all other movables, with the corn upon the ground, excepted." And upon oyer thereof the defendant demurs.

*Within*s, of counsel with the defendant, took several exceptions to the declaration: 1. That the demand by the declaration is of 774*l.* 15*s.*; whereas the whole sum is of 775*l.*; and the 5*s.* paid for earnest shall not be taken as part of the sum of 775*l.* *Sed non allocatur*; for *per curiam* it shall be intended as part of the sum. 2. That the exception of the residue of the movables is not well recited: for the word "except" in the declaration is not good for want of sense. *Sed non allocatur*: for it is sensible enough in the declaration: and if it were not, the declaration is good; for an insensible clause does not make the rest of the deed vicious which is sensible in itself. 3. The great exception was, that the plaintiff in his declaration has not averred that he had conveyed the lands, or at least tendered a conveyance of them; for the defendant has no remedy to obtain the lands, and therefore the plaintiff ought to have conveyed them, or tendered a conveyance of them, before he brought his action for the money.

*Within*s. If by one single deed two things are to be performed, namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance of his part: *Holder v. Tayloe* (1 Rol. Abr. 518, C), *Ughtred's case* (7 Rep. 10), *Gray's case* (5 Rep. 78): and that the word "for¹" made a condition in things executory. And here in this case it is a condition precedent which ought to be performed before the action brought; wherefore he prayed judgment for the defendant.

But it was adjudged by the Court, that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he also has an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said, that both parties had sealed it. Therefore judgment was given for the plaintiff; which was afterwards affirmed in the Exchequer Chamber, Trin. 22 of King Charles the Second.

¹ [EDITOR'S NOTE. E.g. as here "for all his lands."]

KINGSTON v. PRESTON.

KING'S BENCH. 1773.

DOUGLAS, 659.

[*Dependent and Independent Covenants.*]

ACTION of debt, for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated: That, by articles made the 24th of March, 1770, the plaintiff, for the considerations thereafter mentioned, covenanted, with the defendant, to serve him for one year and a quarter next ensuing, as a covenant-servant, in his trade of a silk-mercier, at 200*l.* a year, and in consideration of the premises, the defendant covenanted that, at the end of the year and a quarter, he would give up his business of a mercier to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and to give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for 14 years, and, *from and immediately after the execution of the said deeds, the defendant would permit the said young traders to carry on the said business in the defendant's house.* Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock in trade, at a fair valuation, with the defendant's nephew, or such other person, &c. and execute such other deeds of partnership, and, further, that the plaintiff should, and would, *at, and before, the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of 250*l.* monthly, to the defendant, in lieu of a moiety of the monthly produce of the stock in trade, until the value of the stock should be reduced to 4000*l.**—Then the plaintiff *averred*, that he had performed, and *been ready* to perform, his covenants, and assigned for *breach*, on the part of the defendant, that *he had refused to surrender and give up his business, at the end of the said year and a quarter.*—The defendant pleaded, (1) That the plaintiff did not *offer* sufficient security; and (2) That he did not *give* sufficient security for the payment of the 250*l.* &c.—And the plaintiff demurred generally to both pleas.

On the part of the plaintiff, the case was argued by Mr Buller, who contended that the covenants were mutual and independent, and, therefore, a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one of which he had bound himself to perform; the defendant might have his remedy for the breach by the plaintiff, in a separate action.

On the other side, Mr Grose insisted, that the covenants were dependent in their nature, and, therefore, performance must be alleged. The security to be given for the money, was manifestly the chief object of the transaction; and it would be highly unreasonable to construe the agreement so as to oblige the defendant to give up a beneficial business and valuable stock in trade, and trust to the plaintiff's personal security (who might be, and indeed was admitted to be, worth nothing) for the performance of his part.

LORD MANSFIELD. There are three kinds of covenants: 1. Such as

are called mutual and independent; where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. In the case before the Court, it would be the greatest injustice if the plaintiff should prevail. The essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent.

Judgment for defendant.

MORTON v. LAMB.

KING'S BENCH. 1797.

7 TERM REPORTS, 125.

[Conditions concurrent.]

On Feb. 10th, 1796, at Manchester...in consideration that the plaintiff had then and there bought of the defendant 200 quarters of wheat at 5*l.* 0*s.* 6*d.* per quarter, such price to be therefore paid by the plaintiff to the defendant, the defendant undertook to deliver the said corn to the plaintiff at Shardlow in one month from that time, viz. of the sale. The declaration alleged that although the plaintiff always from the time of making such sale for the space of one month then next following and afterwards was ready and willing to receive the said corn at Shardlow, yet the defendant did not in one month from the time of the making of such sale as aforesaid or at any other time deliver the said corn to the plaintiff, although he was often requested so to do. At the trial the plaintiff recovered a verdict. [The defendant appealed, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery.]

Law, for plaintiff. The covenants here are mutual and independent; and each party has a remedy by action against the other for non-performance of his part. But if there be any precedence between them, the delivery of the goods ought, in the regular order of things, to precede the

payment of the price. In neither case can the averment contended for be necessary. The distinction is taken in many cases that where two things are to be done, and the time of doing it is mentioned for one and not for the other, there the thing for doing which the time is stipulated must be done first, and so averred to be. In *Thorpe v. Thorpe* (1 Salk. 151) it was said by Holt, C.J., that if by the agreement a day certain is appointed for the payment of money, and this day is to happen before the act can be performed for which the money is to be paid, there (although the words are that he shall pay so much *for* the performance of the act) yet after the day appointed the party shall have his action for the money before the thing is performed. And that is a stronger case than the present, because the act for which the recompense is to be given ought in reason to precede the recompense itself.

...Here the first act to be done was by the defendant, namely, the carrying of the corn to Shardlow; by not doing which he broke his agreement; and a cause of action accrued to the plaintiff. But admitting that he was not bound to deliver the corn there until the plaintiff was prepared to pay for it; still that ought to come from the defendant by way of excuse, and the tender of payment was not necessary to be averred by the plaintiff as a condition precedent to the right of action. The defendant might have shewn in excuse for the non-performance on his part, that he carried the corn to the place and was ready to have delivered it, but that either the plaintiff was not there to receive it; or the plaintiff refused to receive it; or he was not ready to pay for it; *Lancashire v. Killingworth* (12 Mod. 531), *Ughtred's case* (7 Co. 10). Where an action is brought for money due, the defendant may shew in his defence that at the day and place appointed the plaintiff was not there to receive it; yet it never was held necessary for the plaintiff to aver in his declaration that he was ready to receive it. And here, if the readiness to pay had been averred, it could have answered no purpose; because no issue could have been taken on it. Besides in no case is tender of payment necessary to be averred when the contract is executory, as it is in this case; for there the parties necessarily rely upon the mutual remedies arising out of it; they give mutual credit to each other. Whether covenants be or be not independent on each other must depend on the good sense of the thing; that is, who, in the fair sense and meaning of the parties, was required to do the first act. Now here there is no doubt that the first act was to be done by the defendant, which he neglected to do. It would be absurd to require a person to pay for goods before he had received them. If he were not ready to pay for them, at the time when the other was ready to deliver them, that might be a reason for the non-delivery; but still that is only matter of defence on the part of the defendant, which it is incumbent on him to shew.

LORD KENYON, C.J....There can be no doubt but that the parties intended that the payment should be made at the time of the delivery... Where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform, his part of the contract. Then the plaintiff in this case cannot impute to the defendant the non-delivery of the corn, without alleging

that he was ready to pay the price of it....In ordinary cases work is to be done before the wages are earned. But those cases do not apply to the present, where both the acts are to be done at the same time...and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

GROSE, J....Here the parties clearly intended that something should be done by each at the same time. The corn was to be delivered at at Shardlow to the plaintiff for a certain price *to be therefore paid* by him, that is, at the time of the delivery. Then the readiness to pay should have been averred by the plaintiff.

Judgment arrested.

BETTINI v. GYE.

QUEEN'S BENCH. 1876.

1 Q.B.D. 183.

[Failure to perform Subordinate Promise not a Discharge.]

THE defendant was the director of the Royal Italian Opera in London, and the plaintiff was a dramatic artist and professional singer.

[They entered into an agreement the relevant clauses whereof were:

"1. Mr Bettini undertakes to fill the part of primo tenor assoluto in the theatres, halls, and drawing rooms, both public and private, in Great Britain and in Ireland during the period of his engagement with Mr Gye.

2. This engagement shall begin on the 30th of March, 1875, and shall terminate on the 13th of July, 1875....

4. Mr Bettini shall sing in concerts as well as in operas, but he shall not sing anywhere out of the theatre in the United Kingdom of Great Britain and Ireland from the 1st of January to the 31st of December, 1875, without the written permission of Mr Gye; except at a distance of more than fifty miles from London, and out of the season of the theatre....

7. Mr Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals."

Bettini was prevented by temporary illness from being in London before the 28th of March, 1875, but he had not given to Gye any previous notice of his inability to attend the rehearsals on the six days. He did arrive in London on the 28th; but Gye refused then to accept his services; and exonerated him from his agreement.

Bettini brought an action for breach of contract: to which Gye pleaded as a defence Bettini's failure to perform his undertaking as to rehearsals. To this plea, Bettini demurred.

Wilson, for defendant. The six days' attendance for rehearsals was a condition precedent. The 7th condition says "without fail"; and shews that the parties thought the rehearsals important. The refraining from singing in Great Britain on and after Jan. 1st is not really a part-performance; *Atkinson v. Bell* (8 B. & C. 277); and so does not preclude rescission.]

BLACKBURN, J....The Court must ascertain the intention of the parties, as is said by Parke, B., (23 L.J.R., Ex. 228) "from the instrument and the circumstances, legally admissible in evidence, with reference to which it is to be construed." He adds: "One particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract." By the agreement, "Mr Bettini agrees to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals." The engagement was to begin on the 30th of March. It is admitted on the record that the plaintiff did not arrive in London till the 28th of March; and therefore he has not fulfilled this part of the contract.

The question raised by the demurrer is not whether the plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable in damages for not doing so; but whether his failure justified the defendant in refusing to proceed with the engagement. The answer depends on whether this part of the contract is a condition precedent to the defendant's liability; or only an independent agreement, a breach of which will not justify a repudiation of the contract but will only be a cause of action for a compensation in damages.

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one. Or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages; and if they sufficiently express such an intention, it will not be a condition precedent.

In this case...there is no such declaration of the intention of the parties either way. In the absence of such an express declaration, we are to look to the whole contract, and see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly as it is one or the other, we think it must be taken to be, or not to be, intended to be a condition precedent.

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But the plaintiff was to sing "in theatres, halls, and drawing-rooms, both public and private," from March 30th to July 13th, and in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from the 1st of January to the 31st of December, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London. The plaintiff, therefore, has, in consequence of

this agreement, been deprived of the power of earning anything in London from the 1st of January to the 30th of March. And though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shews they must be so.

As far as we can see, the failure to attend at rehearsals during the six days immediately before the 30th of March could only affect the theatrical performances (and perhaps the singing in duets or concerted pieces) during the first week or fortnight of this engagement; which is to sing in theatres, halls, and drawing-rooms, for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent. Judgment must be given for plaintiff. The defendant must seek redress by a cross-claim.

Judgment for plaintiff.

[EDITOR'S NOTE. A vivid contrast of circumstances is afforded by the case of *Poussard v. Spiers & Pond* (L.R. 1 Q.B.D. 410) decided in the same court in the same year. Madame Poussard had agreed to take the principal part in an opera during its run. Illness prevented her appearing at the first three performances of it. The defendants consequently refused to allow her to appear at any subsequent ones. It was held that her three absences went to the root of the contract and were a breach of a condition precedent; thus excusing the defendants from their obligation to employ her. Yet no action would have lain against her; since her non-appearance was not wilful but due to sickness. For in all contracts for personal services (e.g. by an actress, a sculptor, an author) there is, unless expressly negated, an implied condition of life and health; thus excusing any incapacity to perform, if created by the "act of God."

In *Hosking v. Pahang Corporation Ltd.* (8 T.L.R. 125) the defendants appointed the plaintiff as an agent at their Malay mines for three years, determinable by six months' notice; at a salary of £700 a year with the *exclusive* use of a house rent-free. He began his duties in June 1889. In June 1890 his superior put a miner to live with him in the house. "He greatly objected to share his house with a miner; and it so affected his nerves that he was unable to do his work." In October 1890 he returned to England; and commenced this action. He did not claim damages for the breach of the stipulation about the house; but, treating it as such a breach as entitled him to rescind the contract, claimed six months' salary. The jury found for him. But the Court of Appeal entered judgment for the defendants: saying, "How could it possibly be said that this breach 'rendered the performance of the remainder of the contract different in substance'? The defendants were entitled to expect the plaintiff to be a man of ordinary nerve; to such a man, what difference could it make whether or not he shared his bungalow?"]

CHAPTER IX

REMEDIES FOR BREACH OF CONTRACT

SECTION I

DAMAGES

ANONYMOUS.

KING'S BENCH. 1505.

Y.B. 21 Henry VII, f. 41, pl. 66.

[*Covenant—Non-feasance.*]

NOTA. If one make a covenant to build me a house by such a day, and he does nothing of this, I shall have an action on my case for this non-feasance, for I am in damage by it; per FINEUX, Chief Justice. And he said that it was adjudged accordingly, and he held it to be law. And so it is if a man make a bargain with me that I shall have his land to me and my heirs for 20*l.*, and that he will make an estate to me; if I pay him the 20*l.* and he will not make the estate to me according to the covenant I shall have an action on my case; and there is no need to sue out a subpœna¹.

¹ MR FINCH'S NOTE. [Reeves in his History of the English Law, Vol. iv. p. 171, thus refers to these cases:—"The opinions delivered in the reigns of Henry VI. and Edward IV. in favour of actions upon the case, for the non-performance of a promise, were confirmed by the train of decisions in this reign. In 3 Hen. VII. 14, an action was brought against a defendant, who, for a sum of money, had undertaken to procure a lease for a person; but instead thereof, he obtained it for himself, in deceit of the plaintiff. When it was objected, upon the old notion, that nothing having been done, no action would lie; as there was no mis-feasance, but merely a non-feasance; Brian demanded, whether if he promised, upon consideration, to make a feoffment to one person, and afterwards made it to another, that would not be a great mis-feasance? endeavouring in this manner to satisfy the scruples of such as still adhered to the ancient opinion; we are told that the court agreed with him. Conformably with this decision, it was declared in 21 Hen. VII. 30, by the whole court, that an action upon the case would lie as well for a non-feasance as for a mal-feasance, and this opinion was on another occasion again recognised (21 Hen. VII. 41); at which time it was said, that if a man bargained that another should have his land in fee for such a sum of money, and neglected making an estate accordingly, an action upon the case would lie, without any need of suing a subpœna in chancery. As the necessity of recurring to a court of equity to establish such agreements was not now so absolute as before, there is no doubt but suits on such questions fell back again into the old channel of the common law. The prodigious advantage of this common-law remedy, to substantiate promises and undertakings, was soon discerned by the legislature; which in this reign passed an act which gave to the action upon the case the same process as was before in an action of debt."]

VALPY AND ANOTHER v. OAKELEY.

QUEEN'S BENCH. 1851.

16 Q.B. 941.

[*Non-delivery of goods—Nominal damages.*]

[THE plaintiffs were assignees in the bankruptcy of Boydell and Roper, dealers in iron. That firm had made a contract to buy from the defendant, an iron master, in July, 1847, "500 tons at 4*l.* per ton, to be delivered, 100 tons the first month, 200 tons each succeeding month; to be drawn for on the first of each month." In July, August and September, 1847, iron was accordingly delivered by the defendant to the bankrupts, and invoices (for 100, 200 and 200 tons) were sent on each occasion. Accompanying each invoice the defendant sent a bill, drawn by defendant, for the price of the parcel; which bills the bankrupts accepted and returned to the defendant. The bill for 100 tons was duly paid at maturity. The two others, for 800*l.* each, dated respectively September 1st and October 1st, 1847, each at three months, were not paid. Against Boydell & Roper a fiat in bankruptcy issued on 11th February, 1848.

Before the bankruptcy the defendant had indorsed one of the bills for 800*l.* to the Royal Bank; who were the holders thereof for value, and subsequently proved the same under the fiat, but never received any dividend. The defendant was the holder of the other bill for 800*l.* at the time of the bankruptcy; and proved the same under the fiat; but, after the commencement of the action, such proof was expunged by the Commissioner on defendant's application. He never received any dividend.

In February, 1849, the solicitors to the assignees wrote to the defendant, stating that about 300 tons of the iron for which the acceptances were given had never been delivered, and requiring delivery. In February, 1850, the assignees commenced the present action, for non-delivery of the residue of the iron. A verdict for the plaintiffs for £2000 was given; subject to a special case for the opinion of the Court.

It was admitted by the defendant that there had been a deficiency of iron to the extent of 185 tons, 10 cwt.; but it was contended on his part that the plaintiffs were entitled to only nominal damages. The plaintiffs contended that they were entitled to recover from the defendant the full price of the iron which had been withheld.]

Hill, for the plaintiffs. The measure of damages must be the same as if the action had been brought immediately on the expiration of the three months in which the iron was to be delivered. The dishonour of the bills could make no difference. The bankrupts were entitled, on giving the bills, to a full delivery of the iron; and, if an action had been brought in October, 1847, for the default, there could have been no set-off on account of the bills. [He cited *Hill v. Smith* (12 M. & W. 618); and *Alden v. Keighley* (15 M. & W. 117); where] the Court of Exchequer held that the measure of damages for the breach of contract was the amount which the bankrupt [who had given bills of exchange] would have had to receive if he had continued solvent and the contract had not been broken. The present action, like those, is on breach of contract. The bankrupts, having given bills, were not in the situation of a vendee who

still has the purchase money in his hands and, if the goods are not delivered, may purchase others at the market price. That the bills were not paid can be ground only for a cross-claim. *Dutch v. Warren* (2 Burr. 1010) shews, both that a special action lies for non-performance of the contract, though if money had passed an action would likewise have lain for money had and received; and also that the damages must be estimated as at the time when the contract should have been performed.

* * * * *

LORD CAMPBELL, C.J. The plaintiffs are entitled to recover. There was evidence of a contract; and we have the powers of a jury. The question then remains as to the amount of damages. These must be only nominal. Justice requires such a decision, and the law confirms it. At the time of the bankruptcy, bills given for the iron were outstanding. While current, they were payment. When dishonoured they were waste paper; it was as if no bill had been given. It is allowed that, if the contract had been to pay by bills, and the vendees had given no bill, they could not have recovered the full value of the iron not delivered, but only the difference between the market price at the time of the breach of contract to deliver, and the price contracted for. It would be as if the payment had been to be made in ready money, and no money had been paid. The parties here are in the same situation as if no bills had been given. There being no difference shewn between the market price at the time of default and the contract price, the vendees could have recovered only nominal damages. No more, therefore, can the assignees. The case rests upon the principle of stoppage in transitu; a right which may be exercised where bills have been given for the goods, and are dishonoured.

PATTESON, J....If the bills had been current when the action was brought, the case would have been different. As soon as the bills became payable the situation of the parties was altered. The cases in the Exchequer which have been referred to were not between vendors and vendees, but were cases in which money had been given for a specific purpose, which the party receiving had undertaken to fulfil, but had not done so; and the Court held that such party was bound to perform his contract, and that the assignees might recover for the non-performance, because the bankrupt might. That is not so here.

WIGHTMAN, J....The bills were dishonoured before there had been a delivery of the goods. Then the vendor's lien attached. It did not dissolve the original contract; but the vendees could not recover the value of the goods.

Verdict for plaintiffs with 1s. damages.

BAIN AND OTHERS v. FOTHERGILL AND OTHERS.

HOUSE OF LORDS. 1874.

L.R. 7 H.L. 158.

[Breach of a contract for sale of Realty.]

[THE defendants, having contracted to buy a leasehold interest in a mine of iron ore, contracted to sell it to the plaintiffs; knowing that it could not be so sold without the consent of the reversioners, but not disclosing to the plaintiffs this fact. This consent being refused, the defendants could not carry out their contract. The plaintiffs brought this action, claiming damages. A verdict in their favour was taken by consent, subject to a special case for the opinion of the Court of Exchequer. It gave judgment for the defendants, which was confirmed by the Exchequer Chamber. The plaintiffs appealed.]

The Solicitor General (Sir G. Jessel) for plaintiffs. The rule in *Flureau v. Thornhill* (2 W. Bl. 1078), though standing for nearly 100 years without being expressly overruled, has not met with hearty consent from the Courts; and it is not recognised in Scotland or in America. At all events, the rule is only applicable to cases where the person contracting to sell is in possession, and where he believes himself to have a good title, and where his want of title is not due to his own default....Here the defendant Fothergill knowingly withheld from the appellants his want of title; he was not in possession; he wilfully abstained from doing what was necessary to entitle him to possession; he contracted, speculating on an expectancy, and he is not entitled to protect himself by the rule.

* * * * *

LORD CHELMSFORD....“The fancied goodness of the bargain” must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine, in consequence of the conflicting opinions likely to be formed upon the subject. And even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from a resale appears to me to be a consequence too remote from the breach of the contract....

The exception which the Court in *Hopkins v. Grazebrook* (6 B. & C. 31) engrafted upon the rule in *Flureau v. Thornhill* has always been taken to be this—that in an action for breach of a contract for the sale of real estate, if the vendor at the time of entering into the contract knew that he had no title the purchaser has a right to recover damages for the loss of his bargain....I do not see how the existence of misconduct can alter the rule by which damages for the breach of a contract are to be assessed. It may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself....I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate must be taken to be *without exception*. Even if a person enters into a contract for the sale of a real estate, knowing that he has no title to it nor any means of acquiring it, the purchaser cannot by an action for the breach of the contract recover damages beyond the expenses he has incurred; he can only obtain other damages by an action for Deceit.

LORD HATHERLEY....In the purchase and sale of real estates, it is

recognised on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor. And, with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating that matter. He has a right also to take the estate and complete the purchase with that defective title, if he thinks proper so to do. But he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled under all circumstances to have that contract completed; and therefore he is not put in a position under such a contract to make a resale before the matter has been fully investigated, and before it is ascertained whether or not the title of his vendor is a good one.

Judgment for defendants.

HADLEY AND ANOTHER v. BAXENDALE AND OTHERS.

QUEEN'S EXCHEQUER. 1854.

9 EXCH. 341.

[Damages—Knowledge of Special circumstances.]

THE plaintiffs were millers at Gloucester; and, on May 11th, their mill was stopped by a breakage of the crank shaft. The steam-engine was manufactured by engineers at Greenwich, and it became necessary to send the shaft to Greenwich as a pattern for a new one. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are carriers, for the purpose of having the shaft carried to Greenwich. The servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of 2*l.* 4*s.* was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were therefore not liable with respect to them. The jury found a verdict with 25*l.* damages (beyond the amount paid into Court). Motion by defendants for a new trial, on the ground of misdirection.

Keating, for plaintiffs. These damages are not too remote, for they are not only the natural and necessary consequence of the defendants'

default, but they are the loss which the plaintiffs have actually sustained....There was ample evidence in the present case of the defendants' knowledge of such a state of things as would necessarily result in the damage the plaintiffs suffered through the defendants' default....

[MARTIN, B. Take the case of the non-delivery by a carrier of a delicate piece of machinery, whereby the whole of an extensive mill is thrown out of work for a considerable time; if the carrier is to be liable for the loss in that case, he might incur damages to the extent of 10,000*l*.]

Waters v. Towers (8 Exch. 401) seems to be strongly in the plaintiffs' favour. The defendants there had agreed to fit up the plaintiffs' mill within a reasonable time, but had not completed their contract within such time; and it was held that the plaintiffs were entitled to recover, by way of damages, the loss of profit upon a contract they had entered into with third parties, which they were unable to fulfil by reason of the defendants' breach of contract.

[PARKE, B. The defendants there must of necessity have known that the consequence of their not completing their contract would be to stop the working of the mill. But how could the defendants here know that any such result would follow?]

There was ample evidence that the defendants knew that the result of non-delivery in due time would be the stoppage of the mill; for the defendants' agent was told that the mill was then stopped, that the shaft must be delivered immediately, and that if a special entry was necessary to hasten its delivery, such an entry should be made....

* * * * *

ALDERSON, B....The proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i.e. according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally (and in the great multitude of cases not affected by any special circumstances) from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. It is said, that cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are

to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule.

Here the only circumstances communicated by the plaintiffs to the defendants at the time the contract was made were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up at the time, and that they only wished to send back the broken shaft to the engineer who made it; this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from...the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred. These special circumstances here were never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits, here, cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances (which, perhaps, would have made it a reasonable and natural consequence of such breach of contract) known by the defendants. The Judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages.

New trial ordered.

EDITOR'S NOTE. "*Hadley v. Baxendale* has ever since been accepted as the guiding rule as to the measure of damages in an action of contract." *Per* Lord Halsbury, L.C., in *Aguis v. G.W. Colliery Co.* (L.R. [1899] 1 K.B. at p. 419). In that case the defendant company had contracted to supply the plaintiff with coal which *they knew* he was to furnish to the steamers of a shipowner. As the defendants failed to perform their contract, a steamer was detained in port, and the shipowner sued the plaintiff, claiming £150. The latter paid £20 into court; which was held sufficient. He then sued the Colliery Company for the £20 (which they admitted

to be due to him from them) and also the full costs (i.e. as between solicitor and client) which he had had to pay to the shipowner. The Court of Appeal (after reviewing conflicting authorities) gave judgment for him; on the second clause of the rule in *Hadley v. Baxendale*, "It is idle to suggest that it was not in the contemplation of the parties that a breach of the contract would probably lead to...a claim by the shipowners....I cannot see any distinction in substance between these costs and the charges of a surgeon attending a plaintiff who has sustained personal injuries through a tort"; *per* Lord Halsbury, at p. 420. As Lord Penzance said: "The question of the measure of damages has produced more difficulty than perhaps any other branch of the law....And though a very excellent attempt was made in *Hadley v. Baxendale* to lay down a rule of practice, it has been found that that rule will not meet all cases." The authority of *Hadley's* case was recognised in *Sapwell v. Bass* (L.R. [1910] 2 K.B. 486); where remote chances, dependent upon nine contingencies, as to the value of a mare's hypothetical future foal were treated as incapable of valuation, and only nominal damages were allowed.]

SCHULZE & CO. v. GREAT EASTERN RY. CO.

QUEEN'S BENCH, 1887.

19 L.R. Q.B.D. 30.

[*Delay in delivery—Loss of Season.*]

THE plaintiffs were woollen merchants; and were in the habit yearly of causing pattern goods to be made. Each pattern was divided into eight or ten pieces so as to make that number of sets of samples. The cost of making was about 630*l.*, exclusive of the cost of other work on the samples. One set of samples was sent with a traveller to Italy, but as it was required for a journey which one of the firm intended to make to Paris, the traveller was directed to return it to Scotland. He accordingly delivered it to the agent of the defendants at Milan, who was informed that the parcel contained samples. It was forwarded to Basle. Thence it was sent by the defendants, on the 14th of July, and a post card was dispatched to the plaintiffs stating that the goods, described as "cotton samples" (a mistake for woollen), were due on the 21st of July. The parcel was not tendered to the plaintiffs till the 9th of September following, and was refused by them. At the time the samples should have been delivered no other set was available for the journey to Paris, and it was worth to them 60*l.* They would have given that sum for such a set, but that it could not be procured in the market or manufactured in less time than a month, or by any other means than by remaking the whole of the patterns. When the parcel was delivered the season for travelling with such goods was over, and the samples were valueless. Day, J., held that a carrier who accepts "samples" for carriage must be taken to know that their value would be diminished by failure to deliver in a reasonable time. He accordingly gave judgment for the plaintiffs for £60.

The defendants appealed.

Crompton, Q.C., for them. The measure of damages adopted was wrong. The only measure of damages is the difference between the market value of the goods at the time when they should have been delivered and at the time when they are delivered. Here there has been no loss of market;

and no injury to the goods; but only a loss by reason of not being able to use the samples in the way of trade. To give damages for this is in effect to take into consideration the profits that might have been made in Paris. *Wilson v. Lancashire and Yorkshire Ry. Co.* (9 C.B., N.S. 632) is a different case, because there the delay was in the delivery of the same goods which were to be made up. Further, there was no notice to the defendants of the object for which the goods were sent.

LORD ESHER, M.R. These goods were delivered to the carriers under a denomination which would inform them that there was a commercial necessity that the goods should be delivered in a reasonable time. In *Wilson v. L. and Y. Ry. Co.* the question arose as to the recovery of damages for a delay by which the plaintiff lost the season; and it was laid down that if "the goods, by reason of their not having been delivered in due time, had become of less value to the plaintiff, because the articles to be made up would be less marketable as the time for finding customers for them had gone by," [then the jury were at liberty to take that fact into consideration]...The cases in which the Courts are bound to consider the market value of the goods are those in which the plaintiff can go into the market and supply himself. If he cannot do so, that measure of damages cannot be applied. Here the plaintiffs could not have supplied themselves with the like goods in the market, and the test of damage to be applied is that laid down in *Wilson v. L. and Y. Ry. Co.*

Appeal dismissed.

EDITOR'S NOTE. Damages, however, must always be assessed *rebus sic stantibus*. Thus in *Wigsell v. School for Indigent Blind* (L.R., 8 Q.B.D. 357) a covenant by the purchaser of land, to build a wall round it, had not been performed. But, before action brought, circumstances so greatly changed that the depreciation caused to the vendor's adjoining land by the absence of the wall was far less than would have been the cost of erecting it. Hence it was held that the true measure of damage was not that cost but the depreciation actually sustained. If *A* lets the sea in upon *B*'s land, worth £20, and swamps it, he would *not* have to pay the sum which expensive engineering operations, to shut it out again, would cost. *Wigsell's* case was recognised in *Marshall v. Mackintosh* (14 T.L.R. 458).

LILLEY v. DOUBLEDAY.

QUEEN'S BENCH DIV. 1881.

L.R., 7 Q.B.D. 510.

[*Damages—Remoteness—Negligence.*]

THE action was to recover the value of certain drapery goods, warehoused by the defendant for the plaintiff, which were destroyed by fire. The contract was that the goods should be deposited at the defendant's repository at Kingsland Road. But a portion of them were deposited by the defendant elsewhere; and, a fire occurring, they were destroyed. The plaintiff had insured the goods, giving Kingsland Road as the place where they were deposited, and in consequence lost the benefit of the insurance. Motion to enter judgment for plaintiff.

Addison, Q.C., for the defendant. There has been no conversion. There having been no intention to convert the goods to the defendant's

use, and nothing to change their quality, the defendant would only be liable in case he did not use reasonable care as a warehouseman: *Fouldes v. Willoughby* (8 M. & W. 540). The damages claimed would be too remote within the rule of *Hadley v. Baxendale* (*supra*, p. 411), as not being in the contemplation of the parties.

GROVE, J....If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing; except where the risk is independent of his acts and inherent in the property itself. That proposition is fully supported by the case of *Davis v. Garrett*¹ (6 Bing. 716); where...Tindal, C.J., decided that as the loss had happened while the wrongful act of the defendant was in operation, and was attributable to his wrongful act, he could not set up as an answer to the action the bare possibility of the loss [having similarly happened] if his wrongful act had never been done. He illustrated the case by saying that a defendant who had by mistake forwarded a parcel by the wrong conveyance, if a loss had thereby ensued, would undoubtedly be liable.

I do not give any opinion whether what was done here amounted to a conversion, but I base my judgment on the fact that the defendant broke his contract, by dealing with the subject-matter in a manner different from that in which he contracted to deal with it....

Judgment for the plaintiff.

SECTION II

SPECIFIC PERFORMANCE

ADDERLEY v. DIXON.

CHANCERY. 1824.

1 S. & S., 607.

[*Chose in action—Value unascertainable.*]

THE plaintiffs having purchased and taken assignments of certain debts which had been proved under two Commissions of Bankrupt, agreed to sell them to the defendant for 2s. 6d. in the pound. The defendant's solicitor, accordingly, gave notice of the sale to the assignees, and prepared an assignment of the debts; and the plaintiffs, notwithstanding the purchase money had not been paid, executed it, and signed the receipt for the consideration money, and left it in the solicitor's hands. The Bill was filed to compel the defendant specifically to perform the agreement, and to pay the purchase money to the plaintiffs. The

¹ [EDITOR'S NOTE. In that case, a barge-owner, who was carrying a cargo of lime for the plaintiff, instead of taking the customary short route round the South side of the Isle of Sheppey, took the unusual and longer course round the North side. There a storm so wetted the lime that it caught fire and was destroyed.]

defendant, by his answer, submitted that the matter of the agreement was not the proper subject of a Bill in Equity for a specific performance.

* * * * *

Hart for the defendant. As the assignment of these debts has been executed and actually delivered to the defendant's solicitor, nothing remains to be done but the payment of the money. If the Court, therefore, were to make a decree it would, in effect, be nothing more than a verdict in an action of Assumpsit for the amount of the purchase money. A Court of Equity lends its aid to the execution of exccutory agreements only. Here the plaintiffs' demand is a mere legal debt. It is not clear that in the converse of this case relief would have been given in this Court. Suppose the defendant had filed a Bill for a specific performance of this agreement, would it not have been said that this Court gives relief only where the specific thing is wanted and damages are not a sufficient compensation?...

LEACH, V.C. Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the "real" nature of the land, but because damages at law, which must be calculated upon the general money-value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a Court of Equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market-price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods.

In *Taylor v. Neville* (3 Atk. 384), specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years and by instalments; and the reason given by Lord Hardwicke is that such sort of contracts differ from those that are immediately to be executed. They differ in this respect, that the profit upon the contract, being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it, at a conjectural price. In *Ball v. Coggs* (1 Bro. P.C. 140), specific performance was decreed in the House of Lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred-weight of brass-wire manufactured by the defendant during the life of the plaintiff. Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life at a conjectural price. In *Buxton v. Lister* (3 Atk 383), Lord Hardwicke

puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity¹; and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that as, in both those cases, damages would not, by reason of the special circumstances, be a complete remedy, Equity would decree specific performance.

The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, a Court of Equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price.

It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled, by repeated decision, that the remedy in Equity must be mutual; and that, where a bill will lie for the purchaser, it will also lie for the vendor.

[EDITOR'S NOTE. But it is to be remembered that Leach, V.C. was inclined "to extend the jurisdiction in Specific Performance somewhat more liberally than most other judges; and the mere want of exactitude in the measure of damages at common law has not always been held a sufficient ground for the equitable jurisdiction"; Fry's *Specific Performance*, 6th ed. § 65.

In *Pollard v. Clayton* (1 K. & J. 462), however, Wood, V.C. supports *Adderley v. Dixon*; on the ground that the purchaser had a right to the specific thing he had bought. But he criticizes *Taylor v. Neville*.]

LAZARUS v. ANDRADE.

COMMON PLEAS DIVISION. 1880.

L.R., 5 C.P.D. 318.

[Assignment of Future-acquired Property.]

AN interpleader issue raised the question whether goods seized in execution of a judgment against one Phillips were the property of the plaintiff, or of the defendant (the execution creditor). The plaintiff claimed under a bill of sale by which Phillips had assigned to the plaintiff "all and singular the stock-in-trade, chattels, goods, and effects now being in, upon, or about...No. 62, Wilson Street, Finsbury, the particulars whereof are set forth in the schedule hereunder written. And also the stock-in-trade, goods, chattels, and effects which shall or may at any time or times during the continuance of this security be brought into the aforesaid...premises, or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade, goods, chattels, and effects now being therein, or any of them." The schedule, specifying the contents of a warehouse, set out various quantities of ostrich and other feathers, and some business furniture. Some stock-in-trade after-

¹ [EDITOR'S NOTE. "He might be under a contract to build a ship by a given time"; per Wood, V.C. (1 K. & J. 462).]

wards brought on to the premises in addition to or substitution for that which was there at the date of the bill of sale was seized as aforesaid....

Bullen, for the defendant. The doctrine of *Holroyd v. Marshall* (10 H.L.C. 191) [that an assignment of future-acquired goods is not a mere licence to seize them, but passes the ownership of them if they be sufficiently specified], only applies to property so specifically described as to be identified. In *Belding v. Reed* (3 H. & C. 955), a bill of sale purported to convey all the bankrupt's property being or hereafter to be upon or about his premises situate at Reedham or elsewhere in the kingdom of Great Britain. Pollock, C.B., said, "the defendant could not lawfully seize property which the bankrupt acquired after the bill of sale was executed; and in this view I see nothing inconsistent with the principle laid down in *Holroyd v. Marshall*." Nothing has ear-marked or identified the future-acquired property.

LOPES, J....It was contended for the execution creditor that the goods brought into the premises subsequently to the execution of the bill of sale did not pass to the plaintiff. The principle is, that property to be after acquired, if described so as to be capable of being identified, may be, not only in equity but also at law, the subject-matter of a valid assignment for value. The contract must be one which a Court of Equity would specifically enforce. *Belding v. Reed* is distinguishable from the present case. The ground of that decision was, that the description was so vague that it did not entitle the claimant to institute a suit for specific performance. Neither the character of the property nor its whereabouts was indicated; and there was nothing to ear-mark it. In this case the property is to be brought into the premises or to be appropriated to the use thereof, either in addition to or in substitution for property then on the premises. I think the assignment sufficiently specific; the property in question having become specific by being brought on to the premises in addition to or in substitution for property mentioned in the schedule.

Judgment for the plaintiff.

[EDITOR'S NOTE. In *Collyer v. Isaacs* (L.R. 19 Ch. Div. at p. 351) Jessel, M.R. says, "A man cannot in equity, any more than at law, assign what has no existence. He can contract to assign property which is to come into existence in the future; and when it has come into existence, equity (treating as done that which ought to be done) fastens upon that property; and the contract to assign becomes thus a complete assignment....Until the property comes into existence, the contract remains only a contract."

In *Clements v. Matthews* (L.R. 11 Q.B.D. 808) a bill of sale assigned (*inter alia*) the "growing and other crops...which at any time hereafter shall be...on the premises of J.B. at High House or any other premises of his." The description of the future crops at High House was held "to be sufficiently distinct and definite to identify the property"; though the Court were not agreed as to whether the italicised clause was not too vague.]

GERVAIS v. EDWARDS.

CHANCERY IN IRELAND. 1842.

2 DRURY & WARREN, 80.

[Specific performance—Prospective difficulties.]

THE plaintiff and defendant were possessed of estates, separated by a stream, which frequently during wet seasons overflowed its banks, to the injury of the said lands. The defendant proposed to the plaintiff that they should join in some measure for the remedy of this evil; and with this view a written agreement, consisting of eleven articles, was entered into between them. By these it was stipulated that the course of the stream should be changed; that, as the effect of making the new channel would be to cut off portions from the estates of both parties, exchanges of land should be respectively made; and that a certain mill-dam should be erected. Arbitrators were named for the purpose of carrying into effect the arrangement. The fifth clause provided, that, in case at the end of twelve months from the making of a certain cut, it should be found to answer the purposes for which it was designed, then the defendant should contribute one-half of the expense of making the said cut. The sixth article was in the words following; viz.

“That if any damage arise to the lands of said *H. G. Edwards*, above said dam, from the erection thereof, the said *F. Gervais* shall give an equivalent in land in the upper part of the said ‘give and take’ to the said *H. G. Edwards*, as compensation for such damage; which damage, if any, the arbitrators shall fix at the time of adjusting the other matters herein, and also lay off the quantity of land to be given by said *F. Gervais*, in lieu of said damage, if any.”

The arbitrators made their award; but the defendant declined to comply with its terms. This refusal occasioned the present suit. The plaintiff, having by his bill waived all right of contribution under the fifth article, prayed generally that the defendant might be decreed specifically to execute the said proposal and agreement, he undertaking performance on his part....

Brooke for plaintiff....The defendant does not state that the execution would be impossible. Nor is the fact so. The sixth article, upon which the entire difficulty turns, is not prospective; it has reference, no doubt, to a calculation to be made; but it is, in effect, an agreement for an exchange, and may be carried out by a deed, with proper covenants....

LORD ST LEONARDS, L.C....The Court acts only when it can perform the very thing, in the terms specifically agreed upon. When we come to the execution of a contract, depending upon many particulars and upon uncertain events, the Court must see, whether it can be *specifically* executed; nothing can be left to depend upon chance; the Court must itself execute the whole contract. There are cases where some of the acts to be done, consequent on the specific execution of the contract, may be performed subsequently. Thus a contract for sale of timber can be specifically executed; although the timber is to be cut down at a future time or at intervals, and the money to be paid by instalments.

It is a certain contract; and the manner of dealing with the thing sold, by future cuttings, is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Here part of this contract is at once capable of a specific execution; this admits of no doubt. But, then, by the rule of the Court, if I am called upon to execute the contract, I must myself specifically execute every portion of it; I cannot give a partial execution of the contract¹.

The plaintiff was perfectly aware of the difficulties arising out of the contract, and he accordingly, by his bill, waived his right to compensation, pursuant to the terms of the fifth article; that part of the contract being one, which the Court could not specifically execute. But he was not enabled to remove what is the real difficulty, arising from the sixth clause, because that contains a stipulation, not for the benefit of the plaintiff, but for the advantage of the defendant, and which the plaintiff could not waive. That important stipulation I cannot disregard. It is said, this is in effect an exchange (which I think it is), and that it may be carried out by a deed; and that there may be covenants to execute that portion of it which is to be performed hereafter. There is no authority in support of this; nor is the difficulty removed, by saying that a deed may be executed to carry out the contract. If a man agree to do a certain act (for example, to dispose of an estate, with a covenant for something to be done hereafter) the Court can carry such a contract into specific execution. The decree would give all that was presently contracted for, the immediate transfer of the estate itself; and compel the party to enter into the covenant to do the particular thing. But here there is an entire contract, which must be executed. Certain things were to be done at once, and certain other things were dependent upon future contingencies. The plaintiff has waived his right, as far as he could. But by the sixth clause it is provided, that if any damage should arise to the lands of Mr Edwards, from the erection of the dam, the plaintiff should give an equivalent in land as a compensation for such damage; which damage the arbitrators were to fix at the time of adjusting the other matters, and also lay off the quantity of land to be given in lieu of such damage.

It is said that this operates either *in presenti*, and has been executed by the award, or that the agreement, in this respect, might form a part of the deed. I am clearly of opinion that this is not a matter to be presently ascertained; but is dependent upon the operation of works contracted to be erected, and can only be ascertained after the works have been in operation. No evidence has been read to shew that it

¹ [EDITOR'S NOTE. The rule may be illustrated thus. The landlord of a block of flats had covenanted with the lessee of a flat to provide a porter, and that this porter should render certain services to the lessees. The latter clause, if specific performance of it were granted, would require constant superintendence by the Court; and such superintendence the Court has always refused to give. It was then suggested that specific performance might be decreed of the earlier clause, which promised that a porter should be appointed. But the Court of Appeal ruled, as in *Gervais v. Edwards*, that "specific performance of part of a contract will not be granted, if the Court cannot grant specific performance of the whole contract." *Ryan v. Mutual T.W.A. Ltd.* (L.R. [1893] 1 Ch. 116).]

formed any part of the award, or that the arbitrators took it into their consideration; and the language of the award does not imply that they did. Well, then, it is a prospective measure, and what is the decree to be? It cannot be made the subject of covenant; that is not the agreement of the parties. Am I to decree the specific performance of that which is now capable of being executed, and then (for I must go on) am I to decree, that if hereafter, when the works, not now commenced, are completed, damage should arise to the defendant's land, the arbitrators shall ascertain the damage, and the plaintiff shall convey land, equivalent in value to such damage? No one ever heard of such a decree. If the case should ever arise of damage, it would, I dare say, lead to a new bill being filed, new witnesses, new questions as to the extent of the damage sustained, and whether the arbitrators acted fairly, and had valued the property correctly. It is impossible to execute this contract specifically.

I am, however, so little satisfied with the conduct of the defendant, in his attempt to evade the contract, that, although I must dismiss the Bill, I shall do so without costs.

DR MARTIN AND HIS WIFE v. NUTKIN & AL'.

CHANCERY. 1724.

2 P. WMS. 266.

[*Contract to abstain—Injunction.*]

THE bill was brought against the churchwardens and the parson and overseers and several of the inhabitants of the town of Hammersmith, to stay the ringing of the five o'clock bell of the town; which usually had been rung at five of the clock in the morning from Michaelmas to Candlemas, except upon holydays and the twelve days at Christmas.

The plaintiffs had a house very near the church; and Lady Howard [Dr Martin's wife], being of a sickly and weak constitution, was much disturbed and disquieted by the ringing of this bell at five of the clock in the morning, and was about removing to another parish, when it was intimated to her on behalf of the parish, that she might purchase her quiet at a reasonable sum to be laid out for the benefit of the parish.... After which the plaintiffs and the parson, churchwardens, overseers and some other of the inhabitants executed articles; and the plaintiffs thereby covenanted to erect a new cupola, clock and bell, and the defendants on their parts covenanted, that the five o'clock bell should not be rung during the lives of the plaintiffs, or the survivor of them. After this the plaintiffs caused the timber to be brought into the churchyard for the erecting of the cupola, which was publicly seen, and the plaintiffs were at the charge of erecting the cupola, clock and bell; and the five o'clock bell was silenced for about two years. But the defendant Nutkin, an ale-house keeper, being since chosen churchwarden, a new order of vestry was obtained for the ringing again of the five o'clock bell; which occasioned the plaintiffs to bring their bill to injoin the ringing of this bell. Lord Chancellor Macclesfield granted an injunction to stay the ringing until the hearing.

And now the cause came on before the Lord Commissioners Gilbert and Raymond, who decreed that the injunction should continue during the lives of the plaintiffs and the survivor of them; for that here was a meritorious consideration executed on the plaintiffs' side; that the churchwardens were a corporation, and might sell the bells or silence them, and make a reasonable agreement beneficial for the parish, and thereby bind the parishioners and their successors as also the succeeding churchwardens; that the ringing the five o'clock bell did not seem to be of any use to the parish, though of very ill consequence to the plaintiff the Lady Howard, and ample recompense had been made to the parish by the plaintiffs both in the expense of the cupola, clock and bell, and also of 1500*l.* laid out in improving the plaintiffs' own house, which otherwise they would have left; and it moreover appearing that the majority and better part of the parish continued willing to abide by this agreement and protested against the new order.

The Court thereupon decreed an injunction against the ringing of this five o'clock bell accordingly.

[EDITOR'S NOTE. The general rule is that the Court will not restrain the breach of one party's negative covenant unless it could specifically enforce the performance of the other party's positive covenant. (Cf. *Gervais v. Edwards*, *supra*, p. 420). So *Martin v. Nutkin*, where such specific performance could not have been granted, is an exceptional case. But "however it may be explained, it is nevertheless a clear authority"; *per* Lord St Leonards (1 De G., M. & G. 614). For, as is shewn by *James Jones Ltd. v. Tankerville* (L.R. [1909] 2 Ch. 440), exceptional cases do arise where injunctions are granted notwithstanding the lack of mutuality.]

TULK v. MOXHAY.

CHANCERY. 1848.

2 PHILLIPS, 774.

[*Covenant affecting freehold interests.*]

IN 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground by the description of "Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one Elms in fee: and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators, "that Elms, his heirs, and assigns should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground."

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor: but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction. An injunction was granted by the Master of the Rolls, to restrain the defendant from using the piece of ground...for any other purpose than as a pleasure ground in an open state, and uncovered with buildings.

R. Palmer, for the defendant [moved to discharge that order]. The covenant did not run with the land, so as to be binding at law upon a purchaser from the covenantor. He relied on the dictum of Lord Brougham, C. in *Keppel v. Bayley* (2 M. & K. 547), that "the knowledge, by an assignee of an estate, that his assignor had assumed to bind others than the law authorised him to affect by his contract,—had attempted to create a burthen upon property which was inconsistent with the nature of that property, and unknown to the principles of the law—could not bind such assignee by affecting his conscience." He drew a distinction between a formal covenant as this was, and a contract existing in mere agreement, and requiring some further act to carry it into effect; contending that executory contracts of the latter description were alone such as were binding in equity upon purchasers with notice; for where the contract between the parties was executed in the form of a covenant, their mutual rights and liabilities were determined by the legal operation of that instrument, and if a Court of Equity were to give a more extended operation to such covenant, it would be giving the party that for which he had never contracted....

LORD COTTENHAM, L.C....The owner of certain houses sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. It is now contended, not that the vendee could violate that contract, but that he might sell the piece of land and that the purchaser from him may violate it, without this Court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it¹ without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this Court cannot enforce it. But the question is not, whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. The price would be affected by the

¹ [EDITOR'S NOTE. That it is only when he sells "part of it" that the principle of *Tulk v. Moxhay* applies, was settled by the Court of Appeal in *Formby v. Barker* (L.R. [1902] 2 Ch. 539). If he sells the whole of the estate, the restrictive covenant "cannot run with the land either at law or in equity...and cannot be enforced against an assignee of the purchaser." There is then no relation between a servient tenement and a dominant one; so the covenant is a merely personal one, obtained for some personal purpose, collateral to the conveyance.]

covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

If there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. Looking at the ground on which Lord Eldon disposed of the case of the *Duke of Bedford v. The Trustees of the British Museum* (2 M. & K. 552), it is impossible to suppose that he entertained any doubt of it....

Lord Brougham never could have meant to lay down that this Court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law.

Motion refused.

[EDITOR'S NOTE. Thus the right of future owners to enforce a restrictive covenant, made with the original purchaser when part of an estate was sold to him, does not depend upon the existence of any right to relief under the common law, but upon a purely equitable doctrine.

In *Haywood v. Brunswick* (L.R. 8 Q.B.D. 403) the Court of Appeal refused to extend this rule to covenants that are not restrictive but require the *doing* of something (e.g. to make repairs). They, however, expressly left open the question whether the rule may not include non-restrictive covenants which impose on the land such a burden as can be enforced on the *land* itself.]

HUNT v. HUNT.

CHANCERY. 1862.

4 DE GEX, F. & J. 221.

[Covenant not to seek restitution of conjugal rights.]

[THE plaintiffs were Emily Mary Hunt, the wife of the defendant, by a next friend, and George Westrup and Robert John Westrup, the trustees of a separation deed, between Mr and Mrs Hunt, dated April 30, 1860.... On April 6th, 1861, the defendant commenced a suit against Mrs Hunt in the Divorce Court for the restitution of conjugal rights, by a petition stating that in March, 1860, Mrs Hunt, without any reasonable or lawful excuse, left the defendant's house, and had ever since refused to return to cohabitation with him; and praying that Mrs Hunt might be ordered to return to the defendant's home and treat him with conjugal affection. Mrs Hunt, by her answer, stated the covenant entered into by the defendant in the separation deed not to endeavour to compel her to cohabit or live with him. The Divorce Court ordered that Mrs Hunt's answer should be reformed by striking out the paragraph which stated the above covenant.

The bill prayed that the defendant might be restrained by injunction from prosecuting the suit in the Divorce Court, and from endeavouring to compel Mrs Hunt to live with him; and that the trusts of the deed of 1860 might be carried into execution and the covenants performed under the direction of the Court.

The Solicitor-General (Sir *R. Palmer*)...[reported in 31 L.J.R., Ch. 165]. If this court recognised the covenant not to sue in the Divorce Court and restrained the proceedings, it would at once not only supersede the functions of the Divorce Court but assume its jurisdiction....In *Wilson v. Wilson* (5 H. of L. 40) all that the injunction amounted to was to restrain the prosecution of Mrs Wilson's suit for nullity; which it had been agreed should be suspended until the execution of the deed. There was no actual interference with pending proceedings by Mr Wilson for restitution. All that the House of Lords decided was that the covenant not to sue in the Ecclesiastical Court was a usual covenant; they did not enter into the question of the rights of the parties upon such a covenant....This court will not enforce separation upon grounds which would not be admitted at the proper forum of matrimonial law.

The Master of the Rolls refused an injunction. Mrs Hunt appealed. The arguments at the bar are unreported.]

LORD WESTBURY, L.C....It has been decided by the House of Lords in *Wilson v. Wilson* that an agreement to execute a deed of separation will be specifically performed; and that a covenant not to sue for restitution of conjugal rights is a proper constituent part of such a deed. The argument before me on the part of the defendant admits the legal validity of the deed, and that an action at law might be maintained for breach of the covenant not to sue for restitution. But it is contended that an injunction ought not to be granted to restrain the breach of that covenant. It is proved that the Court of Divorce, according to the interpretation which, rightly or wrongly, it has put on the statute creating it, will not recognise a deed of separation, or permit it to be pleaded in bar of a suit for restitution. Such was the rule of the Ecclesiastical Court. But an action at law for damages for breach of the covenant not to sue for restitution is a most inadequate remedy. Unless, therefore, the agreement involved in the covenant can be enforced in this Court by means of an injunction restraining its breach, it follows that a deed of separation, whatever may have been the consideration given for it, may be set aside and annulled at the pleasure of either party. A large sum of money may have been given by the relatives of the wife to purchase her release from a brutal and dissolute husband, but when the money has been spent, and when the means of proving his misconduct are no longer available, the husband may defeat the whole by a suit for restitution. That is to say, a legal and valid contract, for which a valuable consideration was given, is defeated and avoided for want of a sufficient remedy at law. But that is one of the cases in which the law of this country has provided that the larger and more effective jurisdiction of this Court may be invoked....

The relative obligations of fulfilling the duties of the marriage contract, which are the basis of the Ecclesiastical doctrine, the common law leaves to the conscience of the parties concerned. It regards a deed of separation as any other legal contract. If the covenant of the husband not to sue for restitution (which is a release of the right to compel cohabitation) be founded upon a valuable consideration, an action may be maintained upon it as upon any other legal covenant. A Court of

equity, in regarding these covenants, cannot take a higher or different ground; it is in this respect bound to follow the law. The remark that a Court of equity, in enforcing the covenant, would be taking on itself the jurisdiction of the Court of Divorce, is no more applicable to this Court, when granting its injunction¹, than it would be to a Court of law when supporting an action on the covenant....

There is another ground stated: namely, that there is no mutuality of remedy, inasmuch as a similar injunction would not be granted to restrain the wife if she instituted a suit for restitution. This, however, is to assume the question at issue. That this Court has jurisdiction to grant an injunction against a feme covert, to restrain her from suing in the Ecclesiastical Court for restitution of conjugal rights, is proved by the judgment and order of Lord Hardwicke in *Hill v. Turner* (1 Atk. 515)²....

Appeal allowed.

[EDITOR'S NOTE. But an agreement between husband and wife providing for the event of a *future* voluntary separation is still held to be invalid, as against public policy. Yet provision for the event of such a future separation as may be ordered by a Court, is valid; *Harrison v. Harrison* (L.R. [1909] 1 K.B. 35). And if, when husband and wife are living apart, they execute a trust-deed with a view to *reconciliation*, a clause in it, providing for the event of a possible subsequent separation, is valid, *Meyrick v. Meyrick* (L.R. [1921] 1 Ch. 311); for this concession tends more to restoring than to endangering the unity of the family.]

WHITWOOD CHEMICAL COMPANY v. HARDMAN.

COURT OF APPEAL. 1891.

L.R. [1891] 2 Ch. 416.

[*Servant's agreement to give whole time.*]

By an agreement in 1885 between the plaintiffs and the defendant, it was provided that the defendant, a manufacturing chemist, should be the manager of the plaintiffs' works for five years, at a salary of £300 per annum, with a commission of $7\frac{1}{2}$ per cent. on the dividends....The agreement contained no provision as to exclusive service.

By an agreement in 1889, it was agreed that the defendant should be manager for an extended term of ten years from September, 1885, at the same salary and with the same commission. The agreement contained the following clause: "The said manager shall give the whole of his time to the company's business," but contained no negative contract by the defendant.

The plaintiffs were incorporated in 1883 for the purpose of working a license, under letters patent for improvements in the carbonization of coal, and the treatment of coal gas. Hardman, the patentee, was the defendant's brother. The license granted an exclusive right to work the patent within an area of ten miles from the company's works.

¹ [EDITOR'S NOTE. Since the Judicature Act, even an injunction is not required; the separation-deed can be raised as a defence in the very suit for restitution. See L.R. [1907] P. at p. 51.]

² [EDITOR'S NOTE. In *Besant v. Wood* (L.R. 12 Ch. Div. at p. 625) Jessel, M.R., held that "The remedy is mutual; and the husband, as well as the wife, is entitled to specific performance of the agreement to live apart."]

It came to the knowledge of the company that the defendant was in communication with a firm of colliery proprietors, whose colliery was distant about a mile from the company's works, with a view to setting up a rival establishment, near the colliery, for carbonizing coal, in which the defendant was to be a director....

It was alleged that the defendant had had special opportunities of mastering all the details of the patent processes and their successful application, both in the service of the patentee himself, and in that of the plaintiff company, and by the use of their property and resources. The defendant admitted that he had been actively engaged in forming a company to work the proposed new business; but stated that the plaintiffs' process was widely known, and that he himself had gained his own skill, knowledge and experience while with his brother, the patentee; and that whilst with the plaintiffs he had learned nothing whatever regarding the patent, and the working thereof, which he did not know before.

The plaintiffs claimed an injunction to restrain the defendant from making any engagement with any person or company other than the plaintiffs, by which the whole of the defendant's time would cease to be devoted to the business of the plaintiffs, or by which the defendant would be prevented from carrying out the agreement of 1889; and in particular from assisting in...any company or partnership for the purpose of carrying on a similar business to those carried on by the plaintiffs; during the residue of the term specified in the agreement. [Mr Justice Kekewich granted an injunction restraining the defendant from giving less than his whole time to the plaintiffs' business. The defendant appealed.]

* * * * *

Warmington, Q.C., for the plaintiffs. The defendant has covenanted to be our manager for a term of years, and during that period to "give the whole of his time" to the plaintiffs' business. The "whole" must be each part; and the positive covenant to give "the whole time" in a particular way, is exclusive in its character, and implies a negative covenant not to give any part of that time to an object or in a manner inconsistent with the due performance of the positive covenant. Yet he is endeavouring to set up within the district a rival company to work the very same patent the plaintiffs are working, and he does devote part of the whole of his time to the business of that rival company. That is a breach of his covenant which we are entitled to restrain by injunction.

The defendant has, moreover, acquired a special knowledge of the plaintiffs' trade process and secrets; and while he is our manager he is in a fiduciary position towards us, and it is a case of "petty treason" for him to start a new company. He is, in fact, in the position of a partner after the expiration of the partnership: *Dean v. MacDowell* (L.R., 8 Ch. D. 345).

LINDLEY, L.J....The plaintiffs take the view that, without their consent, the defendant is not at liberty to release himself from the

obligations into which he has entered by the agreement, and, to that extent, they appear to me to be right enough. If he is committing a breach of the agreement, he is doing that which is wrong in point of law; but that is not the question. The question is as to the plaintiffs' remedy. Now there are various remedies. There is the remedy of dismissal; there is the remedy of an action at law; and there is the remedy by injunction. The plaintiffs are not disposed to avail themselves of the first two remedies. They want an injunction.

The first point to observe is, that there is no negative covenant at all, in terms, contained in the agreement on which the plaintiffs are suing—that is to say, the parties have not expressly stipulated that the defendant shall *not* do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give “the whole of his time” to the plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in *Lumley v. Wagner* (1 De G., 1 M. & G. 604), we should have been relieved from the difficulty of speculating what they had been thinking about....

Now every agreement to do a particular thing involves in one sense a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time. But it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length. We are dealing here with a contract involving the performance of a personal service, and, as a rule, the Court does not decree specific performance of such contracts¹. That is a general rule. There has been engrafted upon that rule an exception, which is explained in *Lumley v. Wagner*—that where a person has engaged *not* to serve any other master, or *not* to perform at any other place, the Court can lay hold of that, and restrain him from so doing. And...the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do some specific thing upon which you can put your finger².

But what injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement?...The principle is that the Court does not decree specific

¹ [EDITOR'S NOTE. It would be quite impossible for the Court to make a man work; and therefore the Court never attempts to do it. But the Court *can* enforce “exclusive” clauses in contracts of personal service—undertakings *not* to do something inconsistent with the contract.]

² [EDITOR'S NOTE. But, if the negative clause be thus merely an implied one, “it must be so definite that the Court can see exactly the limit of the injunction.” Hence a contract “to act exclusively for this employer” implies only a negative “far too indefinite” to be ground for an injunction. See *Mutual Reserve Fund v. New York L.I. Co.* (75 L.T. 528); a case of an Insurance Agent's service.]

performance of contracts for personal service¹; and the question is, whether there is anything in this case which takes it out of that principle. I cannot see that there is....Lord St Leonards in *Lumley v. Wagner* would not have granted the injunction if the negative clause had not been in the contract²....If the principle were that the Court would decree specific performance of *all* contracts, that would carry it. But the principle being the other way as regards contracts of service, it lies upon the plaintiffs to shew that there is some recognized exception in this particular case, and that they fail to do.

I look upon *Lumley v. Wagner* rather as an anomaly; an anomaly which it would be very dangerous to extend....Assuming that the defendant is wrong, the remedy is not by injunction, but by damages.

KAY, L.J....The defendant has never contracted in any way that he will not set up a rival business. He has not contracted that he will not become a director of a rival company, nor that he will not form a rival company. And if he does it out of business hours, it is, as I understand, admitted that no injunction ought to be granted against him....

Appeal allowed.

[EDITOR'S NOTE. This case was followed in *Kirchner v. Gruban* (L.R. [1909] 1 Ch. 143); where it was held that no injunction will be granted to enforce a merely affirmative agreement to serve, or even one which though negative in form, is substantially affirmative. For instance, an undertaking "not to give notice determining the employment" is for all practical purposes an affirmative undertaking to remain in the employment.]

WEBSTER v. CECIL.

CHANCERY. 1861.

30 BEAVAN 62

[Even defendant's own Mistake may bar specific performance.]

THIS was a suit by a purchaser for the specific performance of a contract entered into under the following circumstances. After some negotiations between the plaintiff and defendant, the defendant wrote to the plaintiff a letter dated October 22, 1860; in which he said "The twenty-one acres of land in question I will sell for £1100, and put Moor Cottage into the bargain....I have only one £10 ground rent left, but will sell you that also if you like (with the rest) for £150." On October 25, 1860, the plaintiff wrote to the defendant in reply, as follows: "As you wish for an immediate answer, I write by return to say I accept your offer to

¹ [EDITOR'S NOTE. But this rule as to contracts for services has been held not to cover a contract to provide and employ a third person who is to render personal services to the other contracting party; though specific performance of this contract was refused upon a wider ground, viz. that the Court will not decree a "piecemeal" specific performance; but only performance in entirety, if decreed at all. See note to *Gervais v. Edwards* (*supra*, p. 421).]

² [EDITOR'S NOTE. His words were:—"If I had only to deal with the affirmative covenant of the defendant that she would perform at H.M. Theatre, I should not have granted any injunction."]

sell twenty-one acres of freehold, together with Moor Cottage, for 1100*l.* and a ground rent of £10 for £150, making £1250 (twelve hundred and fifty) as the total purchase-money for the whole...."

On receiving this letter, the defendant became aware that he had made a mistake as to the price asked; which had occurred in the following way. Previously to writing his offer, the defendant had made a calculation upon a piece of paper of the value of each parcel of the land called "the twenty-one acres of land in question." The calculation was produced, and was as follows:

"Moor Ground }	£450	0	0
The Moor }			
Broad Close }	600	0	0
Withy Field }			
Hearn's Piece }	300	0	0
Bridge Mead }			
	500	0	0
	<hr/>		
	1850	0	0
Moor Cottage	250	0	0
	<hr/>		
	£1100	0	0

Told him put *M. Cottage* into bargain at that price and he may have the 10*l.* ground rent for 150*l.*"

It will be observed that the value of the lands and cottage, if correctly added up, amounted to £2100. But through inadvertence and in his hurry to save the post, the defendant added them up as amounting to the sum of £1100; and without reflection inserted that sum in the letter. The property offered for £1100 produced an annual return of £90, and was mortgaged for sums amounting in the aggregate to £1800, and the defendant had already refused to sell it to the plaintiff's agent for £2000.

Upon becoming aware of the mistake he had made in his letter of October 22, the defendant immediately went to the office of the plaintiff's solicitors, and informed them of such mistake; and requested them not to take any steps with a view to the preparation of a contract; and on October 31, the defendant wrote to the plaintiff informing him of the error....

ROMILLY, M.R., was of opinion that the mistake had been clearly proved, and that the defendant had immediately given notice of it. In that state of the case, the Court could not grant specific performance and compel a person to sell property for much less than its real value, and for 1000*l.* less than he intended. The plaintiff, he said, might bring such action at law as he might be advised.

The bill was dismissed without costs.

[EDITOR'S NOTE. Nineteen years afterwards, James, L.J., expressed his opinion that the decision ought to have been emphasized by a dismissal "with costs" (15 Ch.D., at p. 221).

As to the suggested "action at law," Chancery itself can now, since the Judicature Act, give whatever damages would have been given in a common-law court.]

TAMPLIN v. JAMES.

COURT OF APPEAL. 1879.

L.R., 15 CH. DIV. 215.

[Specific Performance—Mistake—Damages.]

THIS was an action by vendors for specific performance.

The plaintiffs, who were the trustees of a will, put up certain parts of their testator's property for sale in lots. Lot 1 was described as:—
 "All that well-accustomed inn, with the brewhouse, outbuildings, and premises known as *The Ship*, together with the messuage, saddler's shop, and premises adjoining thereto, Nos. 454 and 455 on the tithe map, and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs Knowles and Mr S. Merrick. This lot...abuts on other premises of the vendors, on the canal, and on lands now or late of the Rev. W. H. Bathurst."

Lot 1 was not sold at the auction. But immediately afterwards the defendant, who had been present at the auction, made an offer for it which was accepted, and signed a contract for purchase according to the conditions of sale at the price of £750.

At the back of Lot 1, and of the house adjoining it, lay three plots of garden ground, which had formerly belonged to the Rev. W. H. Bathurst, but had since been purchased by the railway company. One of these pieces of ground was in the occupation of the tenant of the messuage and saddler's shop, and the other in the occupation of the tenant of the Ship Inn. Each tenant held his house and the garden at one rent; which was paid to the vendor's agent, who accounted to the owners of the garden ground for their proportions of the rent. The origin of this arrangement, which had been acted upon for many years, did not appear. The rent paid for the gardens was 10s. a year each. Each of these two pieces, which together contained about twenty perches, was partially divided by a fence from the premises with which it was occupied, but there was no boundary of such a nature as to suggest that it belonged to a different owner.

At the auction two plans of Lot 1 were lying on the table, and the auctioneer called the attention of the persons present to them. One of them was a tracing from the tithe map, the other was a tracing on a much larger scale from a map belonging to the railway company. On this latter plan the pieces of garden ground were marked as belonging to the railway company. In each plan the property forming Lot 1 was coloured, so as to distinguish it from the adjoining property. It was correctly described as being 454 and 455 on the tithe map, and included the whole of the closes so numbered.

The defendant deposed that he had not seen the plans, and was not aware of there being any plans in the room; that he had known the property from a boy, and knew that the two plots of garden ground had all along been occupied with the Ship Inn and the saddler's shop respectively; and that he bought in the full belief that he was buying all that was in the occupation of the tenants. He declined to complete unless the gardens were conveyed to him.

* * * * *

[BAGGALAY, L.J. made a decree for specific performance.]

The defendant appealed.

Higgins, Q.C., for the defendant. The Court will not enforce specific performance when there is a clear mistake on the part of the defendant; even though the plaintiff is in no way responsible for it. *Wycombe Railway Company v. Donnington Hospital* (L.R., 1 Ch. 268).

[BRETT, L.J.:—If the defendant relied on his knowledge of the property and misled himself without any fault of the vendors, can he be let off?]

Yes; the other party need not have contributed to the mistake: *Webster v. Cecil* (30 Beav. 62; *supra*, p. 430).

[JAMES, L.J.:—Do you say that if a purchaser says, "I thought the property contained 100 acres and it only contains eighty," he must be let off?]

No; a reasonable ground for mistake must be shewn. Here the vendors framed their description in such a way that the purchaser might reasonably suppose that he was buying all that was in the occupation of the tenants; there being no visible boundary. They ought to have stated that other property was comprised in the holdings, for which rent was paid to some one else. This is much more misleading than anything in *Denny v. Hancock* (L.R., 6 Ch. 1), *Neap v. Abbott* (C.P. Coop. 333), in which cases specific performance was refused. The defendant was not bound to look at the plans, and his not looking at them does not fix him with notice of what he might have learnt by doing so.

JAMES, L.J.:—In my opinion, the order under appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it, and at the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, "I thought the farm sold contained twelve fields which I knew, and I find it does not include them all," or, "I thought it contained 100 acres and it only contains eighty." It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. *Webster v. Cecil* is a good instance of that; being a case where a person snapped at an offer which he must have perfectly well known to be made by mistake....Here are trustees realizing their testator's estate; and the reckless conduct of the defendant

may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse he ought to be held to his bargain.

BRETT, L.J....In *Webster v. Cecil* the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake.

Appeal dismissed.

[EDITOR'S NOTE. Baggallay, L.J., pointed out that "If the vendors had merely referred to the property as being "in the occupation of Mrs Knowles and Mr Merrick," without more, there would have been (at any rate) such an amount of ambiguity that the defendant might reasonably have understood that he was purchasing the whole of the property in their occupation. But the particulars go on."

In *Van Praagh v. Everidge* (L.R. [1902] 2 Ch. 266) the defendant made the still greater blunder of bidding for the wrong lot. This was by his own careless mistake; there being no contributory negligence on the part of the vendor. Specific performance was decreed; but the decree was reversed on appeal, as the Statute of Frauds had not been satisfied. Moreover the M.R. thought the parties were never *ad idem*.]

FLIGHT v. BOLLAND.

CHANCERY. 1828.

4 RUSSELL 298.

[Specific Performance not claimable by Infants.]

[UPON the opening of the case, a preliminary objection was taken, that the plaintiff was an infant; and that the bill of an infant, for the specific performance of a contract made by him, could not be sustained.]

Pepys, for the plaintiff. There are cases, in which a court of equity will decree specific performance, though there is not mutuality of remedy....A party, who has signed an agreement, cannot enforce it against a party who has not signed it; and yet the latter may enforce it against the former....

SIR JOHN LEACH, M.R. No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, although seriously questioned (1 Sch. & Lef. 20) by Lord Redesdale upon the ground of want of mutuality. But these cases are supported—first, because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons applies to the case of an infant. The act of filing the bill by his next friend cannot bind him. The bill must be dismissed with costs; to be paid by the next friend.

IN RE EARL OF LUCAN; HARDINGE v. COBDEN.

CHANCERY. 1890.

L.R. 45 CH.D. 470.

[Specific Performance not claimable by a mere Volunteer.]

By an indenture dated the 10th of October, 1867, and made between the Earl of Lucan of the one part and Ellen Cobden of the other part, (after reciting that the Earl was seised in fee simple of certain lands, tenements, and hereditaments, and was also possessed of and interested in certain other lands and tenements for a term of years, and was also the owner of "various properties, chattels, moneys, and securities for money, and other effects of several natures and descriptions," and that he was minded to secure the said Ellen Cobden an annuity of rent-charge of £300 for her life). It was witnessed that, "for and in consideration of the love and affection" which he had for the said Ellen Cobden, and "for various other good and sufficient considerations," the said Earl did grant unto the said Ellen Cobden an annuity of £300, "to be issuing and payable out of, and charged and chargeable upon, all that and those the said several lands, tenements, and hereditaments, the property of the said Earl of Lucan, and also upon the said several chattels, goods, moneys, securities for money and other effects of the said Earl," to hold the said annuity unto the said Ellen Cobden, her executors and administrators, for and during her natural life, commencing from September 30th, 1867.

The deed contained a proviso against any assignment by the annuitant, and covenants by the Earl for payment of the same, and for further assurance "during the continuance of this security and the subsistence of the annuity."

At the time when this deed was executed, the Earl was entitled to a reversionary interest in a sum of about £12,000 railway stock standing in the names of the trustees of his late father's will; which had been bequeathed to him subject to a prior life interest therein, which was still subsisting. He was also possessed of certain family plate and pictures, and was seised of a small amount of real estate.

The annuity was regularly paid by the Earl down to September 1888; but on his death, in November, 1888, his personal estate was found to be insufficient to meet all his liabilities, and the real estate alone was not sufficient to provide for the annuity. An inquiry had been directed in the above-mentioned action, which had been commenced for the administration of the Earl's estate, whether the claim of the said Ellen Cobden as a creditor in respect of the deed of annuity was to any and what extent valid, and whether, if valid, she had a charge upon any and what part of the Earl's estate. The Chief Clerk, by his certificate, found that she had a valid claim, which gave her priority over subsequent creditors; and that a sum of £438 was then due for arrears. The plaintiffs, the executors of the Earl, thereupon took out a summons to vary this finding; which was adjourned into Court, and now came on for argument.

* * * * *

Ford, for the defendant, Ellen Cobden. I do not contend that any of the pictures or plate can be charged; but as to the reversionary interest, I say the deed was effectual. A voluntary assignment of a reversionary interest in a sum of stock is good...; and this charge is equivalent to a partial assignment, and is therefore good *pro tanto*. I am in the same position as an assignee. The Earl, as the *cestui que trust* of this stock in the hands of the trustees, has by this deed (in effect) directed that a portion of it shall belong to me. This creates a valid trust in my favour; which I can get enforced here, even though the deed was voluntary; *Rycroft v. Christy* (3 Beav. 238). The effect of this deed was to place the defendant, to the extent of the value of her annuity, in the same position as the Earl. I submit that I have a charge on this stock in the hands of the trustees which can be enforced in Equity; and which gives me priority over any subsequent creditors....

CHITTY, J. observed that the deed, though voluntary, created a charge on the real estate which was unquestionably valid. But that with reference to the covenant for payment, the deed being a voluntary deed, the covenantee would be postponed in equity to creditors for value; neither could she, for the same reason, have specific performance or any assistance by a Court of Equity by virtue of the covenant for further assurance.

He continued: There remains this singular point. At the time when the deed was executed the Earl of Lucan had a reversionary interest in a fund held by trustees upon trust for some one for life with remainder to himself. And the deed recites, amongst other things, that the Earl is possessed of and interested in, various properties, chattels, moneys, and so forth. And then the operative part of the charge is not merely on the lands; but the charge is on the several goods, chattels, moneys, and securities for moneys, and other effects, of the Earl. It is admitted by Mr Vaughan Hawkins, who argued for the executors, that there is really no question of construction on the instrument; and that it is sufficient, had it been for value, to charge the Earl's reversionary interest in the trust fund that I have mentioned. But, though that point is conceded, it is not conceded that this deed can have any operation, equitable or otherwise, against the reversionary interest itself; since it is not given for value....

If the Earl had plainly, on the face of the deed, given this reversionary interest to the lady, that would have been a good gift; and she then could, when the reversion fell in, have given notice at once to the trustee (though that would not have been necessary for the purpose of perfecting the gift), and could have gone with this deed and asked the trustee to assign the trust fund to her. All that is admitted. The argument so far is quite correct.

Then comes the question whether this deed creates a perfect and complete equitable charge. It is unnecessary to say that, in the case of a gift, the gift must be complete; and equity will not assist in completing an imperfect gift; though it is equally plain that equity will protect a donee who, by a valid gift, has obtained the title to the enjoyment of the thing that has been given....

I cannot hold in favour of the annuitant. Because the thing itself, that is the reversionary interest, is not given and not transferred by the deed; the utmost that the deed does is to create a charge. If the annuity had fallen into arrear two or three years after it was granted, and the tenant for life of the trust fund was still living, could this lady have instituted an action against the trustee for the purpose of having her annuity raised out of the reversionary interest? Plainly not. Could she have instituted an action against the donor? This really brings me to the point of the case. What is given is not the thing but a charge upon the thing. That is the true effect of the deed. Then the Court would be asked, in such a suit as I have suggested by the voluntary donee, whether the thing, which had not been given, could be sold for the purposes of raising the arrears of the annuity. That appears to me to bring me to this conclusion, that it is not perfect as it stands. I think that this right, which has been contended for on the part of the lady by her counsel, is a right which, when the matter is carefully analysed, depends upon contract. Of course, so soon as I have got to that point (that it is upon contract), then there can be no performance of the contract, and no assistance given to the volunteer by a court of equity in the performance of the contract. The right, which would thus be claimed by the lady, would not be the mere right of having the thing given protected; but it would be a right, if it existed, to have that which was not given sold in order to make good the gift.

For these reasons I think that the lady's claim fails.

IN RE HARE AND O'MORE'S CONTRACT.

CHANCERY. 1900.

L.R. [1901] 1 Ch. 93.

[Unheard oral correction of written misdescription.]

THIS was a summons by the purchaser under the above contract, asking for a declaration that he was entitled to compensation for misdescription of the property therein comprised.

A number of leasehold houses were sold in lots by auction on March 23, 1900. The particulars of sale described lots 4 and 5 as follows:

"Lot 4. Highfield Road, Saltley.—Four Capital Private Houses, each with hall entrance, garden and out-buildings in the rear, adjoining lot 3, and called 'Eastbourne,' and producing at low rents £72. 16s. per annum. Term eighty-five years from Midsummer next. Ground-rent, £12.

"Lot 5. Highfield Road, Saltley.—Four Similar Houses, called 'Somerville,' situate in the Highfield Road, adjoining the last lot; let to tenants of long standing, at old-fashioned rents producing £67. 12s. a year. Leasehold for eighty-five years from Midsummer next. Ground-rent, £12."

Condition 14 provided as follows:

"Any error, misstatement, or omission in the particulars shall not annul the sale, but (if pointed out before the completion of the purchase,

and not otherwise), shall form the subject of compensation, which shall be allowed by the vendor or purchaser as the case may require."

The purchaser inspected lot 4 before the sale, and found that the houses had entrance-halls and water-closets.

He attended the sale, and purchased lot 5 for £580 in reliance, as he asserted, on the statement in the particulars that the houses were "similar" houses to those of lot 4, whereas it was found that the houses of lot 5 had no entrance-halls, and had privies in lieu of water-closets, the rent being less in consequence than that of the houses in lot 4. He thereupon claimed £77 compensation for the misdescription.

The vendor alleged that, before putting up lot 5 for sale, the auctioneer made a verbal statement correcting the misdescription, which the purchaser must have heard, and one of the requisitions made on behalf of the purchaser asked for a written statement by the auctioneer of what he had said at the sale. This was furnished; but at the trial the purchaser denied that any such statement was made, or, if made, that he heard it....On hearing the evidence, the Court found that the statement had been made clearly and distinctly; but that it was not proved that the purchaser had heard it. The question was, therefore, whether on that finding the purchaser was entitled to specific performance with compensation.

Jolly, for the purchaser. The verbal statement of the auctioneer at the time of sale is not admissible as evidence to vary the printed particulars;...at all events, as against a purchaser who did not hear the statement, *In re Edwards* (62 L.T. 445). In the present case the contract was signed without any amendment; and the purchaser, whether he heard the statement or not, is entitled to specific performance with compensation under condition 14: *Lett v. Randall* (49 L.T. 71)...In *Manser v. Back* (6 Hare 443), the purchaser was refused specific performance of the unamended contract, but on the ground of mistake, hardship, and revocation of the auctioneer's authority to sign that contract. It was a very strong decision, and does not appear to have been expressly followed in any subsequent authority....

JOYCE, J....The question is, whether when a statement correcting a material misdescription in the particulars has been made clearly and distinctly by the auctioneer at the time of sale, but the purchaser is not shewn to have heard that statement, the circumstances are such as to render it inequitable to grant the purchaser specific performance with compensation for the misdescription. The vendor relied on *Manser v. Back* (6 Hare 443), and I reserved judgment in order to consider that case, which, it was suggested, had not been followed in any subsequent authority.

Manser v. Back, if good law, is a clear authority for relieving the vendor from the contract in such a case as this. In *Manser v. Back*, there was a distinct verbal statement by the auctioneer in the auction room, which the purchaser did not hear, and it was held that it was inequitable to enforce specific performance of the contract on the vendor without the verbal modification introduced by the statement. I do not find that *Manser v. Back* has ever been questioned or disapproved....I entirely agree with it.

Lett v. Randall, on which the purchaser relied, does not affect the present case, the only point decided being that the mere fact that the purchaser knew of a misdescription in the particulars did not preclude him from enforcing specific performance with compensation; while in *In re Edwards* there was no evidence that the purchaser did not hear the verbal statement, and Chitty, J., held as a fact that he must be taken to have heard it. In this case, therefore, I cannot enforce specific performance with compensation against the vendor; and, as the purchaser does not wish to complete without compensation, I will rescind the contract, order the return of the deposit with interest, and give the purchaser the costs of investigating the title down to the time he was furnished with the written statement of the auctioneer. Subject to this, I dismiss the summons without costs.

[EDITOR'S NOTE. Viscount Haldane's words in *Rutherford v. Acton-Adams* (L.R. [1915] A.C. at p. 869), are a terse summary of principles. He said: "In exercising jurisdiction over specific performance a Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship, he may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission; or a claim for damages for deceit where there has been fraud; or for a breach of a collateral contract, if there has been such a contract."]

CHAPTER X

INTERPRETATION OF CONTRACTS

LYLE *v.* RICHARDS AND OTHERS.

HOUSE OF LORDS. 1866.

L.R. 1 APP. CA. 222.

[The Court, not the Jury, must interpret a written contract¹.]

THE plaintiff Lyle brought in the Court of Queen's Bench an action of trespass against the defendants. The first count of the declaration charged that they broke and entered a certain mine of the plaintiff in the county of Cornwall, known as the West Basset Mine, and carried away copper ore, etc. The second count charged them with taking the plaintiff's copper ore. The particulars of demand claimed the value of the ore actually taken as above £4000, the whole damages as £10,000.

The defendants (who did not deny the possibility of a trespass to a certain extent, but who insisted that the plaintiff claimed too extensive a boundary line), paid £525 into court, and pleaded that that sum was sufficient to satisfy the claim of the plaintiff. Issue was taken on that plea. The question between the parties related entirely to boundary.

[In the "sett" or lease of the mine in 1835, the southern boundary line was thus described, "a straight line of about 355 fathoms from John Vincent's house at the south-west extremity of the sett to a boundstone at the north-west extremity of South Wheal Bassett Sett"; and it was added "which said premises are particularly described by the map on the back of this sett." On this map the boundary line appeared to be drawn from the north-west corner of Vincent's house. The position of the house itself was incorrectly represented on the map. In 1852 this lease was surrendered by Lyle, the plaintiff; and a new lease of the same mine was granted to him which made no reference to a map. At the trial the defendants produced the leases and maps of their adjoining mines. Channell, B., treated the case as one depending on the construction of deeds and maps; and directed a verdict for plaintiff. The Queen's Bench refused to enter the verdict for the defendants; but the Exchequer Chamber reversed this. Lyle appealed.]

Sir R. P. Collier, for the appellant. The question here was really

¹ [EDITOR'S NOTE. And indeed even an *unwritten* one, whenever the parties are agreed as to what the exact words used by them were. "Where a contract is oral, the question what the contract *is* must, if controverted, be tried by the jury as a question of fact. But where the terms of a contract are undisputed, its construction and effect—where the contract is oral as well as where it is written—are to be determined by the Court"; (106 Mass. at p. 216). But it too often happens that the words are disputed between them, or even that their bargain does not depend upon words alone but upon (as was said by Pollock, C.B.) "a series of acts and things done, from which the jury have to determine what was the real intention and meaning of the parties."]

parcel or no parcel—which is a question of fact and ought to have been decided by the jury; and not, as a matter of construction, by the Court. The deed of 1835 left it ambiguous where the boundary line was to be drawn. It referred to a house as something from which it was to be drawn. But a house has extent, and is not a mere point, and the question whether the line was to be drawn from one part of the house or the other was the very matter in dispute. The deed referred to the map. But though the line, as marked on the map, has been altered, and though the map appears to shew the part of the house whence the boundary line was to start, the map itself is erroneous as to the position in which it places the house. Extrinsic evidence was, therefore, necessary to be resorted to, and was admissible. In *Waterpark v. Fennell* (7 H.L.C. 650) such evidence was admitted to explain words in a deed, because those words were of a general nature, and of a doubtful import.

The ambiguity here was a latent ambiguity, and, therefore, extrinsic evidence was necessary to correct it....Even in the Court below the Lord Chief Baron said that a map was a matter for the jurymen, not for the Judge, to look at.

[LORD WESTBURY. The map is part of the sett of 1835; is not the construction of the deed the construction of the map which forms part of the deed?]

It may be so; but as a matter of fact, not of law...parol evidence must be determined on by the jury. In *Smith v. Thompson*, Maule, J. said (8 C.B. 59), "Generally speaking, the construction of a written document is for the Court, but where it is shewn by extrinsic evidence that the terms of this deed are ambiguous, evidence is admissible to explain the ambiguity, and to shew what the parties really meant. When there is an election between two meanings, it is properly a question for the jury." If so, the decision of the Court below, which treated this as a matter of construction, and made that construction depend on a map admittedly erroneous, cannot be supported.

* * * * *

LORD CRANWORTH, L.C....The boundary line of the plaintiff, which separates it from the mine of the defendants to the south, is described in the sett made to him in 1852. It was the duty of the Judge to decide what was the true meaning of the language there used for describing the boundary line. But in order to adapt the description, contained in a lease or other instrument, of a boundary line (whether expressed by words or by a diagram) to the line in nature meant to be designated by the description it is necessary to have recourse to parol evidence. The description in the deed cannot otherwise be identified with the thing intended to be described. In this case, therefore, parol evidence was properly admitted for the purpose of shewing whether the place in which the trespass complained of was committed, was or was not included in the sett of the plaintiff.

The boundary line on the map is drawn in a straight line from the bound-stone to the north-east corner of the house; and the existing house called "John Vincent's house" is that referred to in the map of 1835

Strictly these were both questions of fact. It was for the jurors to say, looking at the map, to what part of the spot there designated "John Vincent's house" the boundary line was drawn. But it is so plainly drawn to the north-east corner that this has always been assumed as a fact; so that if this precise point had been put as a question to the jury, it must and would have been so found. So, again, it was the duty of the Judge to ask whether the evidence satisfied the jury that the actual existing house, called "John Vincent's house," is the house intended to be described on the map. In deciding this the jurymen would have to consider, on the one hand, the fact that there is no other house known by that name; and, on the other hand, to remember the erroneous position of the house on the plan. Mere error of position on the plan cannot of itself be decisive. If the house itself had been five miles off, the jury would, of course, have come to the conclusion that such a house could not have been what was meant to be designated. If, on the other hand, the house drawn on the plan was only one yard out of its proper place, the jury would disregard such an inaccuracy. In fact, it is misplaced by about one hundred or one hundred and twenty yards to the west, by ten or twenty to the south.

It was for the jury, in these circumstances, to say whether the actual house was or was not that intended in the sett and map of 1835 as forming one terminus of the boundary. Assuming (as we must assume) the jury to have been satisfied that, in spite of the error in its position on the map, the house as it exists on the land is the house intended, and that the line on the plan is drawn from the north-east corner of the house, it was the duty of the Judge to tell the jurymen, as matter of law, that the boundary line is the line drawn from the north-east corner of the actual house to the bound-stone....The judgment of the Exchequer Chamber was right.

LORD CHELMSFORD....The Exchequer Chamber has properly dealt with the case as one of judicial construction of written documents.... Their judgment ought to be affirmed.

LORD WESTBURY....The construction of written instruments is matter of law; and when a written instrument is laid before jurymen they are bound to receive the interpretation of the effect of that instrument from the Judge....

Appeal dismissed.

[EDITOR'S NOTE. The principle was thus expressed by Parke, B., in *Neilson v. Harford* (8 M. & W. at p. 823): "The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances (if any), have been ascertained as facts by the jury. And it is the duty of the jury to take the construction from the Court:—either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law. For a misconstruction by the Court is the proper subject of redress in a Court of Error; but a misconstruction by the jury cannot be set right at all effectually." Lord Westbury approved this ruling (4 De G., F., and J. 294).

And in this, as in all other parts of his case, it is for the plaintiff to establish

what he contends for. "It is the plaintiff's duty to make cut that the constructive which he has put upon [the contract], in declaring, is the true one. This he has failed to do, if the matter be at all doubtful. I remember a case at Chester where the jury said they found the contract produced quite unintelligible. It was held that the judge was justified in ruling that the plaintiff had failed to sustain his declaration." *Per Jervis, C.J.*, (10 C.B. at p. 889).]

MORRELL AND OTHERS v. FRITH.

EXCHEQUER. 1838.

3 M. & W. 40

[*Acknowledgments to bar the Statute of Limitations are not now excepted from the rule.*]

ASSUMPSIT for money lent, interest, and on an account stated. Plea (1) non assumpsit, and (2) the Statute of Limitations. At the trial before Gurney, B., it appeared that the defendant being indebted to the plaintiffs, who were bankers at Oxford, in a balance of £479 (which had been due above six years), the plaintiffs' attorney, in May, 1837, applied to him on their behalf, by letter, requesting him to remit the balance due to them, or if not convenient, to inform him what arrangements he had to propose for the settlement of his account. No answer being given to this application, the plaintiffs' attorney, on the 13th of June, again wrote to the defendant, requesting to know in what way, or at what time he proposed to pay the balance, or what security he could give for it. On the 28th of July, he received from the defendant the following letter:

"Since the receipt of your letter (and indeed for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your first application respecting the demand of Messrs Morrell against me. I propose being in Oxford tomorrow morning, when I will call upon you on the matter."

It was contended for the plaintiffs, that this letter was a sufficient acknowledgment in writing to take the case out of the Statute of Limitations. The learned Judge was however of opinion that it was not sufficient, and although requested by the plaintiffs' counsel to leave that question to the jury, he declined to do so, and directed a nonsuit.

Ludlow, Serjt., moved for a new trial. The letter was a sufficient acknowledgment within the 9 Geo. 4, c. 14; or at all events, the effect of it ought to have been left to the jury for their decision: *Lloyd v. Maund* (2 T.R. 760), *Bird v. Gammon* (3 Bing. N.C. 883).

[PARKE, B. I have always doubted the correctness of the doctrine laid down in *Lloyd v. Maund*.]

That case has never been overruled: and in *Bird v. Gammon* Tindal, C.J., expressly recognises its authority. He says, "The first objection is, that it was left to the jury to say what was the effect of the letter. But by a chain of cases, from *Lloyd v. Maund* to *Frost v. Bengough* (1 Bing. 266), and others, it appears that such has been the constant course."

[LORD ABINGER, C.B. In order to support your case, you ought to cite some authority in which it was held that a document, which the

Court thought *did not* raise any acknowledgment, ought to have been left to the jury. In *Bird v. Gammon*, the Judge had stated his opinion that the letter was a sufficient acknowledgment, and in that opinion the Court concurred.]

It may be admitted that, in order to found the argument, the document must appear to be one from which an acknowledgment or promise to pay might fairly be inferred by the jury....If the jury, on this letter being left to them, had found for the plaintiffs, would the Court have said they had done wrong?

LORD ABINGER, C.B. I think there is no ground for a rule. This letter contains nothing that can be construed into an acknowledgment of the debt; the utmost that can be made of it is, that it is evasively worded, so as to avoid any direct acknowledgment.

Then the next question is, whether it ought to have been left to the jury. One case in which the effect of a written document must be left to a jury is where it requires parol evidence to explain it, as in the ordinary case of mercantile contracts, in which peculiar terms and abbreviations are employed. So also, where a series of letters form part of the evidence in the cause, they must be left, with the rest of it, to the jury. But where the question arises on the construction of one document only, without reference to any extrinsic evidence to explain it, it is the safest course to adhere to the rule, that the construction of written documents is a question of law for the Court. The intention of the parties is a question for the jury; and, in some cases (in cases of libel for instance), the meaning of the document is part of that intention, and therefore must be submitted to the jury. But where a legal right is to be determined from the construction of a written document which is either unambiguous, or of which the ambiguity arises only from the words themselves, that is a question to be decided by the judge....

PARKE, B. This letter contains no acknowledgment of a debt *simpliciter* and no promise to pay....

I think the case of *Lloyd v. Maund* is not law. The construction of a doubtful instrument itself is not for the jury, although the facts by which it may be explained are....

ALDERSON, B. I agree in the opinion which has been expressed by my Lord and my brother Parke, as to the authority of the case of *Lloyd v. Maund*. Where it is a letter only, and there is no evidence beyond the written instrument itself, the construction of it is for the Court only, and not for the jury. The case of mercantile documents is altogether different. There the meaning of the words themselves is in question, being words that are used in a particular and technical sense. It is as if the document were in a foreign language, and the truth or propriety of the translation were in question.

Rule refused.

[EDITOR'S NOTE. This decision, restoring the general principle of law after long succession of cases had seemed to engraft upon it an exception, was approved by the Exchequer Chamber in *Smith v. Thorne* (18 Q.B. 141).]

DI SORA v. PHILLIPPS AND OTHERS.

HOUSE OF LORDS. 1863.

10 H.L.C. 62

[*The province of the Judge in interpreting foreign contracts.*]

[IN 1835, Lady Gwendaline Talbot married at Rome the Prince Borghese. By a prenuptial contract, in the Italian language, her father, the Earl of Shrewsbury, agreed to give her a dowry of £40,000, payable by certain specified instalments; and, further, by Article 5, to give her "a portion [*porzione*] equal to that of his other next of kin in his inheritance [*eredità*] free and discharged [*depurata*] from the debts and legacies with which it may be burdened." At his death in 1852 it was found that the legacies bequeathed by his will were such as (along with his debts) to exhaust all the residue. A question at once arose on Article 5 as to whether the word *depurata* applied to *porzione* or to *eredità*; i.e., to whether he meant the portion of residue to be ascertained before or after the payment of debts and legacies. The Princess Borghese had died in 1840. Her only child, the Duchess Di Sora, filed a bill in Chancery in 1854, asking that her rights in respect of the Earl's estate might be ascertained. Many Italian lawyers were called on both sides as to the effect of Article 5 under the law of modern Rome: their opinions differing.]

WOOD, V.C. decided that *depurata* applied to *eredità*; and accordingly dismissed so much of the bill as claimed a moiety of the residue free and discharged from debts and legacies. The plaintiff appealed. A question arose as to the manner in which an English judge should form his opinion on the construction of any contract that has to be interpreted according to the law of a foreign country.]

Rolt, for the appellant. Foreign instruments must be construed according to the law of the country where they are made [cf. p. 4 *infra*]. To an English judge that law is a matter of Fact; which he must receive in evidence, like any other fact; *Bremer v. Freeman* (10 M. & P.C. 306)...Where there is a difference of opinion, he must not take upon himself to adjudicate between the conflicting opinions but must take those which [numerically] preponderate....He must do the best he can to find which is the preponderating opinion; but he cannot decide which the greater value is attached. Here the Vice-Chancellor went upon the supposition...that you may give such evidence of the principle of foreign law as shall instruct the judge in that law, and then he, being imbued with it, may construe the instrument himself. That was the mistake; for it was claiming to exercise a judgment on the intrinsic value of the evidence as to what is the foreign law.

[LORD BROUGHAM. Then you contend that...the application of the foreign law is as much a question of Fact as that law itself?]

It is so.

* * * * *

LORD CHELMSFORD....The construction of a contract is nothing more than the gathering of the intention of the parties to it from the words they have used. If the law applicable to the case has ascribed a peculiar meaning to particular words, the parties using them must be bound

that meaning. But if there is no such established sense, the intention must be collected in the ordinary manner from the language employed; and we know from experience that different minds often arrive at opposite conclusions of intention from the same expressions. The meaning of a foreign instrument therefore (cleared of the difficulty of technical terms) cannot be a fact to be proved. It is at the utmost merely a probable opinion of the witnesses as to the construction which would be likely to be put upon it by the foreign tribunal. And if the Judge is implicitly to receive the opinion of the witnesses, or of the majority of them, they in fact perform his office and construe the instrument for him.

That the construction must be a matter of judgment on the part of the English judge is admitted by both parties; the difference between them (undoubtedly a very wide one) being, whether he is to judge the contract itself, or to judge the opinions of the witnesses upon it. The office of construction of a written instrument, whether foreign or domestic, brought into controversy before our tribunals properly belongs to the Judge. In the case of a foreign instrument, he necessarily requires some person's assistance. In the first place he must have a translation of the instrument; a translator being a witness as to the meaning and also the grammatical construction of the words. He must then have the way cleared for him by evidence explanatory of any words which are of a technical description, or which have a peculiar meaning, different from that which, literally translated into our language, they would bear. And, if there is any established principle of construction of the particular instrument by the foreign tribunal, proof of it must be given. But the witnesses having supplied the Judge with all these facts, they must retire and leave his sufficiently informed mind to his own proper office—that of ascertaining for himself the intention of the parties; in other words, of construing the language of the instrument in question....

It seems rather questionable whether the Judge has a right to resort to the foreign law itself for information, when the evidence of the witnesses is not satisfactory to his mind. The witnesses are at liberty to adduce, in support or confirmation of their testimony, text books and decisions of the foreign courts; authorities which, becoming a part of their evidence, may enable the Judge to form his own opinion upon the particular text of foreign law thus laid before him. But it seems contrary to the nature of the proof required in these cases, that the Judge should be at liberty to search for himself into the sources of knowledge from which the witnesses have drawn, and produce for himself the fact which is required to be proved as a part of the case before him. As Lord Brougham said in the *Sussex Peerage Case* (11 Cl. & F. 115), "The Judge has not organs to know and to deal with the text of the foreign law; and therefore requires the assistance of a lawyer who knows how to interpret it¹."

¹ [EDITOR'S NOTE. But "if an expert witness, called to prove foreign law, states that any textbook, decision, code, or other legal document, truly represents that law, then the Court is at liberty to regard the legal document to which he refers (not as evidence *per se*, but) as part of the testimony of the witness; and to deal with it, and give the same effect to it, as to any other portion of the evidence of the expert witness." *Per Lopes, L.J., in Concha v. Murrieta, A.D. 1889 (L.R., 40 Ch. D. at p. 554).*]

Whatever may be thought, however, of the degree of assistance required by the Judge in ascertaining what is the foreign law, there is no authority for depriving him of an independent judgment in the ultimate construction of a foreign instrument....

In this case, it was quite legitimate evidence to shew (what it was said no *English* lawyer could properly appreciate) the importance of the title of Dower, and the favour shewn to it by the Roman law; and that by that law the conferring a *dos* is imperative upon a father on his daughter's marriage. So, too, as to the irrevocability of the provision once made; and as to the institution of an heir; and as to any peculiar meaning which attaches to the words *eredità libera*, *legati*, or any other technical expressions in the clause to be construed. All this evidence was legitimately offered in aid of the construction. But, all this assistance having been rendered by the witnesses, their office was at an end; and the Judge was entitled then to enter upon his own peculiar duty of construing the clause, according to the intention of the parties.

Decree affirmed.

[The rule thus laid down had been expressed by Vice-Chancellor Wood, in the court below, in the following fuller terms:

"When I have been told what the words mean grammatically, and when I have been told of all the special rules (if any there be) of construction applicable to the language—when I have had the technical words explained to me—when I have had the principles peculiar to foreign law, both as to construction and as to the effect of an instrument, detailed before me in evidence—then it is my province to apply, as far as I can (having all that information before me) any general rule of grammatical construction which may exist, or any general rule of law which is not peculiar to one code or another but co-extensive with every system of jurisprudence. (I may give as an instance, that effect is to be given to every word in a contract, if possible.) General principles are within my province. I have, farther, to discuss the weight of the testimony; where I am to be guided by testimony and it is necessary for me to come to a conclusion on the weight of that testimony which is so given."]

CHATENAY v. BRAZILIAN S. T. Co. LD.

COURT OF APPEAL. 1890.

L.R. [1891] 1 Q.B. 79.

[The interpretation of foreign contracts.]

APPEAL from a judgment of Day, J., on a preliminary issue.

In the year 1880 the plaintiff, who was a Brazilian subject and resident in Brazil, executed, in favour of one Broe, a stockbroker carrying on business in the city of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language, and was executed by the plaintiff in Brazil with the formalities required by the Brazilian law. Broe, purporting to act under the power of attorney, disposed of certain shares in

the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares; the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of the register by inserting therein his name as holder of the shares. [He contended that the contract must be governed by the law of the country where it was to be performed; and that if construed, accordingly, by English law, it did not authorize the transfer of shares except under a special letter of advice from the plaintiff to his agent.] An issue was directed to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question, whether Brazilian or English law was to govern the construction of the power of attorney, should be tried by a judge without a jury. The matter came on before Day, J., who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out.

The defendants appealed.

Finlay, Q.C., for appellant. This is a document executed in Brazil according to Brazilian law, and must be governed by the law of that country. Assuming the document to have been intended to be acted on in a number of different countries, still it can only have one interpretation, and cannot be differently construed in each of the countries in which it is acted on; which would be the result if the learned judge's decision is supported. If the view of the defendants is correct and the document is to be construed according to the law of Brazil, then they are in a position to shew that the authority is perfectly general to buy and sell; so that the plaintiff would be bound by the acts of his agent. If the opposite view is right, he might be bound in one country and not bound in another, in transactions exactly similar in character. The decision of this case is not affected by the rule that if a person in one country gives power to another person to do something in another country he must be taken to have intended that the law of the latter country should apply to the transaction; for here the power to act is perfectly general, and is not confined to any specified country. He cited *Maspons y Hermano v. Mildred* (9 Q.B.D. 530) and *Jacobs v. Crédit Lyonnais* (12 Q.B.D. 589).

* * * * *

LORD ESHER, M.R....This writing was a business document, written in Brazil in the Brazilian language, and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business in Brazil. An English Court has to construe it; and the first thing, therefore, that the English Court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you

must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil under the circumstances. Therefore you would want a competent translator, competent to translate in that way. And, if the words in Brazil had in business a particular meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer. That is the first thing the Court has to do. Then, when the Court has got a correct translation into English, it has to do what it always has to do in the case of any such document—either a contract, or such an authority as this—that is to say, determine what is to be taken to be the meaning of the party at the time he wrote it, and what is to be inferred from the language which he has used. There are certain inferences which are adopted in ascertaining the meaning of the language used, unless in the particular instance the contrary intention appears. One inference which has been always adopted is this: If a contract is made in a country to be executed in *that* country, you take it that the parties must, unless there appears something to the contrary, have intended that that contract, as to its construction, and as to its effect and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to the conclusion, that if a contract is made in one country to be carried out between the parties in *another* country, either in whole or in part, it is to be concluded, unless there appears something to the contrary, that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise; for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties; unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said that, if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country is taken (unless something appears to the contrary) to have been intended to be carried out according to the laws of that country....

If it appears that the contract is to be performed in Brazil wholly—that is to say that the contract shall be performed according to Brazilian law. That is the construction of it, and that is the meaning of the parties. But if it appears that it was to be wholly carried out in England, we should infer that the meaning of the parties and the true construction of the contract were that it was to be carried out according to English law. If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting *one* construction only on the document; and not putting

a different construction on it in different countries. The one meaning that he had was "I give an authority which if carried out in England is to be carried out according to the law of England; if in France, according to the law of France." That is *one* meaning, though this authority is to be applied in a different way in different places....The extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon.

Appeal dismissed.

[EDITOR'S NOTE. Prof. Dicey thus sums up the rule of Private International Law: "The proper law of a contract is *primâ facie* the law of the country where it is made (*lex loci contractûs*). Yet when a contract is made in one country but is wholly or partially to be performed in another, then great weight will be given to the law of the place of performance (*lex loci solutionis*) as being probably the proper law of the contract, in regard at any rate to acts to be done *there*." (*Conflict of Laws* p. 565.)]

SOLLY AND ANOTHER v. FORBES AND ELLERMAN.

COMMON PLEAS. 1820.

2 BROD. & B. 38.

[*The parties' Intention is the main guide.*]

[A RELEASE of trading debts due to the plaintiffs was given by them to Ellerman, one of two partners, with a provision that it should not prejudice any claims which the plaintiffs might have against Forbes, the other partner; and that in order to enforce the claims against Forbes, it should be lawful for the plaintiffs to sue Ellerman, either jointly with Forbes or separately. This action was brought by plaintiffs against Forbes and Ellerman; and the release was pleaded by Ellerman with an averment that the action was prosecuted against him jointly with Forbes, for the purpose of enabling the plaintiffs to recover payment of moneys (due from the defendants to the plaintiffs) either out of the joint estate of the defendants, or from Forbes or his separate estate. The replication was demurred to.]

Blosset, Serjt., in support of the demurrer. First, the provisos in this release are void, as being repugnant to the nature of the instrument.... If a proviso be inconsistent with the nature of the deed, either as expressed on the face of it, or as it is to be implied from the legal effect of the instrument, the condition is void.

* * * * *

DALLAS, C.J....Of the intention of the parties no doubt can be entertained. It was meant to release Ellerman as to person and effects, but not Forbes; and, therefore, to retain against Ellerman every right and remedy necessary to enforce payment from Forbes. But so to construe the release as to make it a release of both (which it would be if no action could be brought against Forbes because Ellerman could not be joined) would make it operate not to effectuate but to defeat the intent of the parties.

...But against this, objections of a technical and artificial nature have been raised. We have been referred to many cases, in which it has

been held that a saving or condition repugnant to the nature of the grant is void, and that the grant remains absolute and unqualified, the condition no way operating in restraint of the grant. It is not necessary to pursue these cases into their detail: they are all cases of notoriety, the law of which is not to be disputed, and the only question is upon their application. But with respect to them all I would observe, that in one of the cases cited at the bar it was correctly stated that the rule of construction in modern times has been more equitable than formerly: courts looking rather to the intention of the parties than to the strict letter; not suffering the latter to defeat the former but in certain cases of exception, to which it is not now necessary to refer....

What are the rules of law which apply, narrowing them to the particular point? I pass over the general and leading principle, that the intent of the parties shall prevail as far as by law it may; and, further, that Courts will be anxious so to construe the law as to give effect to that intent, provided it do not contravene any fundamental rules of the policy of the law. If a deed can, therefore, operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed.... In *Payler and Others v. Homersham* (4 M. & S. 423), Lord Ellenborough adopts the position that the general words of a release may be restrained by the particular recital. "Common sense" (said his Lordship) "requires that it should be so; and in order to construe any instrument truly you must have regard to all parts, and especially to the particular words of it."

Demurrer overruled.

[EDITOR'S NOTE. The importance of the parties' Intention is well illustrated by the rule that, when a contract has been filled in, upon a printed form, the words so added in *writing* "are entitled (if there should be any reasonable doubt upon the sense and meaning of the whole), to have a greater effect attributed to them than to the *printed* words. The written words are the immediate language selected by the parties themselves for the expression of their meaning. The printed words are a general formula, adapted equally to their case and to that of all other contracting parties upon similar occasions." *Per* Lord Ellenborough, C.J. (4 East 136); approved in *Glynn v. Margetson* (L.R. [1893] A.C. 357). Cf. too pp. 466-7 *infra*.]

COLES v. HULME.

KING'S BENCH. 1828.

8 B. & C. 568.

[*The intention manifested may even supply an omitted word.*]

[DECLARATION by the plaintiff as administrator of Catherine Coles, deceased, on a bond. The condition of the bond recited that one Burckhardt was indebted to Catherine Coles in various sums of money, viz. £1000, £1500, £2359. 1s. 3½d.; and that the bond was given by Burckhardt and the defendant to secure payment of those sums. At the trial it appeared, upon the production of the bond, that in its obligatory part, the word "pounds" was omitted. It merely stated that the obligor became bound in "7700," without stating of what coins.]

It was objected by Sir James Scarlett, for the defendant, that the bond was void for uncertainty, because it did not specify any description

of money; it might, therefore, be marks, guineas, or pounds. Lord Tenterden, C.J., was of opinion that, as it appeared by the condition that the bond was given to secure various sums of money described as being composed of pounds etc., it might fairly be inferred that the penal part of the bond given to secure the payment of those sums should be in the same species of money; and that in furtherance of that intention the word "pounds" might be supplied. He directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Sir James Scarlett now moved accordingly....The sum is a material part of a bond. If the sum be expressed ungrammatically, the defect may be supplied where the intention of the parties can be collected. Where the obligation was "in octaginta libris" with a condition to pay £40, it was adjudged a good obligation for octoginta libris (*Com. Dig. tit. Obligation* (B), 3, where several other instances are collected). But there is no case where the entire omission of the number of pounds has been supplied. On the contrary, it was declared by the Court in *Loggins v. Titherton* (Yelv. 225), that such an omission would render the bond void. If so, upon the same principle, the omission of the description of money in which the party is bound must render the bond void. Accordingly, a bond whereby a man is bound in twenty "liveries" is void, because it does not appear that "libris" was intended (*Com. Dig. Obligation* (B), 5); or "in viginti literis," instead of "libris" (*Partrose's Case*, cited in *Hills v. Cooper*, Cro. Jac. 603). If, however, it be only improperly expressed, as "ponds" instead of "pounds," the defect may be supplied if the intent of the parties be apparent. There is no instance where the total omission has been remedied....

The object of the parties might as well be obtained by the insertion, in the bond, of "guineas" as of "pounds."...

LORD TENTERDEN, C.J. In every deed there must be such a degree of moral certainty as to leave in the mind of a reasonable man no doubt of the intent of the parties. The question in this case is, Whether there is in this bond that degree of moral certainty as to the species of money in which the party intended to become bound? I thought at the trial there was. The obligatory part of the bond purports that the obligor is to become bound for "7700." No species of money is mentioned. It must have been intended that he should become bound for some species of money. The question is, Whether from the other parts of the instrument we can collect what was the species of money which the party intended to bind himself to pay? [His Lordship then read the recitals in the condition, and proceeded as follows.] It appears, therefore, that the intent was that the defendant should enter into a bond for securing to Coles various sums of money, described in these recitals as being composed of pounds sterling and other money of a smaller denomination. That being so, I cannot entertain any doubt that the intention was that the obligor should, in order to secure the payment of those sums, become bound in a penalty consisting also of pounds sterling. If that were the intention, then the bond ought to be read as if the word "pounds" were inserted in it.

BAYLEY, J. It has been decided that, in furtherance of the obvious intent of the parties, even a blank may be supplied in a deed¹. In *Waugh v. Russell* (1 Marshall, 214), the word "hundred" was omitted in the later part of the condition of a bond. It was held that it might be supplied; and that, in pleading, the bond might be described according to its legal effect, as if the word "hundred" had been inserted in it. I think in this case that it is obvious that the obligor meant to bind himself in a penal sum consisting of pounds sterling; and, therefore, that the omission of the word pounds may be supplied.

Nonsuit refused.

[EDITOR'S NOTE. It is useful to remember that if, in an instrument *inter vivos* there are two clauses so inconsistent that they cannot be reconciled, and both are equally consistent with the apparent general intention, the earlier of them is to take effect. But in a Will, the later clause is to be preferred. Cf. 15 Simon, 126 with 20 Beav. 123.]

BACHE AND OTHERS v PROCTOR.

KING'S BENCH. 1780.

1 DOUGLAS, 383.

[*The intention of the parties may enlarge the meaning of their written words.*]

ACTION on a bond, with a penalty of £2000. By the condition (reciting that *A* had been appointed treasurer to the poor of the parish of *B*) it was declared, that, if *A* from time to time, and at all times, while he continued in that office, should and did render to the plaintiffs a true, just, and perfect account, in writing, of all and every sum and sums of money that he should receive for the relief and maintenance of the poor of the said parish, the bond should be void....According to the last account in writing rendered by *A* (as treasurer) to the plaintiffs, there appeared to be due from *A*, as treasurer, to the plaintiffs, £276. 6s. 5½d. He was afterwards requested to "render and pay" that sum to them, according to the form and effect of the said condition. Thjs he neglected and refused to do, and the same still remained due....

The defendant contended that the rendering and paying the sum so supposed to be due, was not a matter required by the condition; nor was the refusal of payment a breach of the condition....

Davenport, for the defendant, insisted on the strict letter of the condition. The non-payment and refusal was not a breach of the stipulation to "render an account in writing." These are two distinct things; the rendering an account being a preliminary step, to enable the plaintiffs to discover exactly what was due; in order that they might know what to call for when they should require payment.

¹ The case alluded to by the learned Judge was, probably, that of *Lloyd v. Lord Say and Sele* (10 Mod. 46). There the name of the bargainor was omitted in the operative part of a bargain and sale; and it was supplied in the King's Bench, it appearing from other parts of the deed that Lord Say was the grantor. The judgment was affirmed in the House of Lords (1 Br. P. C., 379). Cf. *Mourmand v. Le Clair* (L.R. [1903] 2 K.B. 216); "seven" held to mean "seven pounds."

Baldwin, for the plaintiff, was stopped by

LORD MANSFIELD, who said it was clearly the intention of the parties, and the fair construction of the condition, that the money should be paid by A or (in his default) by the defendant.

BULLER, J., resembled the case to one in the Common Pleas, where the condition of a bond was, that it should be void if the obligor *did not pay*; and, performance being pleaded on the ground of the literal expression, the court held that the palpable mistake of a word should not defeat the true intention of the parties. Here (he said) it never could be meant that so large a penalty should be taken merely to enforce the making out a paper of items and figures.

Judgment for plaintiffs.

[EDITOR'S NOTE. This case was cited and approved in *Wilson v. Wilson* (5 H.L.C. at p. 67). The latter was a case of a separation-deed, one clause of which strangely provided that so long as "John Wilson" (the husband) performed his covenanted duties under it he should be "indemnified from all the present debts and liabilities of the said John Wilson." This, as Lord Cranworth said, was "nonsensical and irrational," the obviously appropriate indemnity being one against his wife's debts, not his own. It arose, as his Lordship added, from "a mere accident, the name was copied wrongly" (*John* for *Mary*). Lord St Leonards remarked (p. 66) that "a court of law, as well as a court of equity, may correct an obvious mistake on the face of an instrument, without the slightest difficulty....No man ever heard of a man's being indemnified against his own debts!...I advise your Lordships to consider 'John' as erroneously inserted instead of 'Mary,' as it clearly appears by the context to have been; and by so considering it, to make that part compatible with the rest, and thus give effect to what was the clear intention of the parties."]

STEELE v. HOE.

QUEEN'S BENCH. 1849.

14 A. & E. N.S. 431.

[The parties presumably intended that construction which makes the contract valid.

Ut res magis valeat quam pereat.]

[THE Rev. John Edwards, minister of a chapel, had advanced £700 towards its erection. He resigned office in 1840. An agreement with him was then entered into by the two deacons, and signed by them, that "In consideration of your having resigned the pastoral office,...and the church having...accepted the same and agreed to pay you at the earliest possible period the sum of £700...we, the deacons of the said church, hereby agree to hold ourselves responsible to you for the carrying out of the said resolution."

Steele in 1845 resigned office; and Hoe then "in consideration of your having resigned the office of deacon and your connection with the Baptist church at Clapham," gave him a guarantee for the payment of what still remained due of the £700. Steele ultimately paid the full residue to Mr Edwards; and brought this action against Hoe for reimbursement.]

Watson, for defendant....In the letter of 1845 the only consideration apparent is an executed one, without mention of a request. [Cf. *East-*

wood v. Kenyon (*supra*, p. 14³); *Lampleigh v. Brathwait* (*supra*, p. 168); and *Haigh v. Brooks* (*supra*, p. 178).]...There is no ambiguity which could render evidence admissible....

PATTESON, J....[He had already said that it was not easy, in this second contract, to trace a connection between the promise to pay and the resignation.] We think that the words, in their ordinary acceptation, are capable of expressing either a past or a concurrent consideration. As upon one construction the instrument is void, the other, which makes it valid, is to be adopted....

Each side of a contract is consideration, or is promise, according to the party speaking of it. If each party were to put into writing his own promise, each side of the contract would, in turn, appear to have preceded the other; though both formed one agreement. The plaintiff might write "You having guaranteed, I resign"; and the defendant "You having resigned, I guarantee."...*Thornton v. Jenyns* (1 M. & G. 166) shews very clearly that the form of expression in question is capable of this construction. It seems to us to follow that this construction should be adopted; the presumption being that the parties did not intend that their act should be void. No extrinsic evidence is required for this construction; but such evidence would be requisite for the party alleging that the instrument ought to be held void....

Judgment for plaintiff.

[EDITOR'S NOTE. In *Mare v. Charles* (5 E. & B. 978) three bills of exchange were drawn by the plaintiffs upon the defendant who was the "purser," or bursar, of a mining company, but was not a partner in it. The defendant accepted all three in this form "Accepted for the Company, William Charles, purser." A verdict for the plaintiffs having been directed, a nonsuit was moved for but was refused. Lord Campbell said: "If a bill be drawn on me, I must accept it so as to make myself liable personally or not at all; for no one but the drawee can accept....If the words of an instrument will reasonably bear an interpretation making it valid, we must not construe them so as to make it void." And Coleridge, J.: "Are we to construe this as not an acceptance, *ut res magis pereat*? No, we must construe it *ut res magis valeat*;...and it is easy so to construe it."

Thus Coke tells us that "If an estate be made to A 'for life,' without mentioning whose life, then, if the lessor be seised in fee simple, it shall be held to be for A's own life [on the *contra proferentem* principle]. But if the lessor be tenant in tail, then it will be held to be an estate for *his* life"; lest there be, under the then law, a Discontinuance. Co. Litt. 42. See also the cases cited p. 466 *infra*.]

KEMBLE v. FARREN.

COMMON PLEAS. 1829.

6 BINGHAM, 141.

[A stipulation for "Liquidated Damages" may be shewn by the circumstances to be intended as merely a stipulation for a Penalty.]

ASSUMPSIT by the manager of Covent Garden Theatre against an actor; to recover liquidated damages for the violation of an engagement to perform at Covent Garden for four seasons.

By an agreement between the plaintiff and defendant, the defendant had engaged himself to act as a principal comedian at Covent Garden

Theatre for four seasons, commencing with October, 1828, and in all things to conform to the regulations of the theatre. The plaintiff agreed to pay the defendant £3. 6s. 8d. every night on which the theatre should be open for theatrical performances during the ensuing four seasons; and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, *or any part thereof, or any stipulation therein contained*, such party should pay to the other the sum of £1000; to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties to be *liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof*.

The breach alleged was, that the defendant refused to act during the second season. At the trial the jury gave a verdict for the plaintiff for £750 damages; subject to a motion for increasing them to £1000, if the Court should be of opinion that, upon this agreement, the plaintiff was entitled to the whole sum claimed as liquidated damages.

Wilde, Serjt., contra. In all cases the rule is, to collect the intention of the parties from the language of the agreement; and not to decide what is reasonable or unreasonable, for on that no two persons would be found to agree. On the contrary, if a contract be never so unreasonable, the Court will sustain it, provided it appears clearly to have been the intention of the parties to carry it into effect....Although the sum fixed in the present instance may appear somewhat exorbitant when applied to slight violations of the contract, the parties probably fixed it on the whole agreement on account of the difficulty of ascertaining the damages in matters regarding theatrical performances. It would be difficult, if not impossible, to prove the precise sum the plaintiff would lose by the defendant's neglecting to attend rehearsals and so performing imperfectly the parts allotted to him, or by his transferring his services to a rival establishment....The language in which the liquidated damages are agreed to be paid is the strongest that can be employed. It manifests the clearest intention that the parties shall abide by it; and if it be not sufficient to secure the payment, there is no language and no contract by which payment can be secured.

TINDAL, C.J....It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the

present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3. 6s. 8d. per day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have in modern times endeavoured to relieve by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the Bar that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say that if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of *Astley v. Welldon* (2 B. & P. 346); in which it was stipulated that either of the parties, if neglecting to perform the agreement, should pay to the other of them the full sum of £200, to be recovered in his Majesty's courts at Westminster. Here there was a distinct agreement that the sum stipulated should be liquidated and ascertained damages: there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments. The action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court that, for this very reason, it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only.

Judgment for £750.

[EDITOR'S NOTE. There thus are cases where the Court looks not merely, as usual, at the language of the contract, but also at the character of the transaction and the circumstances under which it was entered into; and thence comes, as Lord Parmoor said (L.R. [1915] A.C. at p. 100), "to the conclusion that the parties *have made a mistake* in calling the agreed sum 'liquidated damages,' and that such sum is not really a pactional pre-estimate of loss...but a penal sum inserted as a punishment." (He added, "It is too late to question whether such interference with the language of a contract can be justified on any rational principle").

Accordingly, as Lord Mersey said in *Webster v. Bosanquet* (L.R. [1912] A.C. at p. 398), "Whatever be the expression used in the contract in describing the payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant and one which no Court ought to allow to be enforced. It is impossible to lay down any abstract rule as to what may or may not be extravagant, or unconscionable, without reference to the particular facts and circumstances in the individual case."]

DUNLOP PNEUMATIC TYRE CO. LD.
v. NEW GARAGE M. CO. LD.

HOUSE OF LORDS. 1914.

L.R. [1915] A.C. 79.

[Rules as to interpreting agreements for "liquidated damages."]

[THE plaintiffs, who were manufacturers, in selling their motor tyres, covers, and tubes, to trade-purchasers, allowed them certain discounts. But in return they required the purchasers to enter into "price-maintenance" contracts, binding them not to tamper with the marks on Dunlop goods, nor to sell or offer the goods to any private customers or to any Co-operative Society at less than the Dunlop Company's current list-prices, nor to supply to any persons whose supplies the Dunlop Company had decided to suspend, nor to exhibit or export any Dunlop goods without the consent of the plaintiffs. The contracts further bound these trade-purchasers to pay the sum of £5 for every tyre, cover, or tube sold or offered in breach of the agreement, "as and by way of liquidated damages and not as a penalty."

The defendants did sell tyre-covers to a Co-operative Society for £3. 12s. 11d. each, instead of the current list price of £4. 1s. The plaintiffs commenced this action for breach of contract. It was proved that the plaintiffs had no patents protecting their business, and that nearly all their sales were to trade-purchasers; and that the probable effect of underselling by any particular trade-customer would be to force their other trade-customers to buy from rival manufacturers instead of from the plaintiffs. Though the consequent injury to the plaintiffs' business might be very serious, it would be very difficult to prove the precise amount of the loss so sustained.

The £5 was decided to be liquidated damages. But the Court of Appeal held it to be a penalty; and the plaintiffs to be entitled to only nominal damages. The plaintiffs appealed.]

McCall, K.C., for the respondents. The question is whether this case falls within the line of authorities from *Kemble v. Farren* (*supra*, p. 456) down to the present time; which are described by Lord Coleridge in *Magee v. Lavell* (L.R. [1874] 9 C.P. 107), as establishing the principle "that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." That rule has been acted upon in this House and in the Privy Council; and a rule so well established ought not to be lightly interfered with.... Upon the construction of this agreement the sum of £5 applies to all the foregoing clauses; and on that hypothesis it covers matters of very different importance. And if the amount of damage in any of the cases covered by this stipulation is so small that the agreed sum would be an inordinate amount to pay for it, that goes far to shew that this sum ought to be regarded as a penalty. The Courts have drawn a marked distinction between a single stipulation which may be violated in different ways and a series of stipulations of widely different value.... Moreover, the pre-estimate must be one that is made by both parties,

and it must be shewn that the respondents had some knowledge of the prejudicial result which a breach of the contract would have upon the relation of the appellants to their agents.

LORD DUNEDIN....I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative.

1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case.

2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction, to be decided upon the terms and inherent circumstances of each particular contract; judged of as at the time of the making of the contract, not as at the time of the breach, *Webster v. Bosanquet* (L.R. [1912] A.C. 394).

4. To assist this task of construction various tests have been suggested. Such are:

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount, in comparison with the greatest loss that could conceivably be proved to have followed from the breach. An illustration is given by Lord Halsbury: "If you contracted to build a house in a year, and agreed that if you did not build the house for £50 you were to pay a million of money as a penalty, the extravagance of that would be at once apparent" (L.R. [1905] A.C. 6).

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid; *Kemble v. Farren*. This, though one of the most ancient instances, is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when *A* promised to pay *B* a sum of money on a certain day and did not do so, *B* could only recover the sum (with, in certain cases, interest), but could never recover further damages for non-timeous payment; or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable—a question which much exercised Jessel, M.R., in *Wallis v. Smith* (L.R., 21 Ch.D. 243)—is probably more interesting than material.

(c) There is a presumption (but no more) that it is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage"; (Lord Watson in 11 App. Cas. 332).

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as

to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties....[The present case] is just one of those where it seems quite reasonable for parties to contract that they should estimate the damage at a certain figure; and, provided that that figure is not extravagant, there would seem no reason to suspect that it is not truly a bargain to assess damages but rather to be held *in terrorem*....

* * * * *

LORD PARMOOR....In the present case there is no question of extortion; or of giving a larger sum as liquidated damages for a fixed or ascertainable sum, in reference to any of the stipulations to which the agreed figure is applicable; and no ground for altering the terms of the contract as arranged by the parties. The parties adopted a wise and prudent course, having regard to the nature of the contract and the practical impossibility of an accurate ascertainment of damages.

Appeal allowed.

[EDITOR'S NOTE. The stringency of these judiciary canons of construction is often overrated. Hence Bigham, J., protested against the doctrine "that my finding as to the intention of the parties is to be controlled by the rules which have been laid down in the authorities. I think the only rule which applies to all cases is that the judge must look to *all* the circumstances of each particular contract—to what the parties *did* as well as to the language used—and must say from them what the intention of the parties was....The expression 'liquidated damages' is to be disregarded only in plain cases; where the plain intention of the parties, to be gathered from all the circumstances, was that the sum was to be a penalty." *Pye v. British Automobile C.S. Ltd.* (L.R. [1906] 1 K.B. 425).]

LORD DORMER v. KNIGHT.

COMMON PLEAS. 1809.

1 TAUNTON 417.

[Words must, primarily, be taken in their ordinary meaning.]

[ACTION of covenant, to recover the arrears of an annuity of £800 per annum granted to the plaintiff for the use of his sister, the defendant's wife. The defendant pleaded another deed executed by the plaintiff, by which it was covenanted that if the defendant's wife should "associate, continue to keep company with, or cohabit, or criminally correspond with J. F." the annuity of £800 should cease; and, instead thereof, the defendant should be compellable to pay an annuity of £400 only; and that she did afterwards associate with J. F., by which the annuity was reduced to £400. The replication denied that she had associated with J. F. Upon the trial before Mansfield, C.J., several witnesses proved that Mr F. had frequently called at the house, and had left his card like any other visitor: he had sometimes been admitted; but the witnesses had never seen any improper behaviour in him, nor any appearance of levity in the lady. On this evidence plaintiff contended that he was entitled to recover the whole annuity of £800. But Mansfield, C.J., thought it was the meaning of this deed, that there should be no com-

munication whatever between the parties; and that if the innocent visiting sworn to had taken place, the annuity was reduced to £400 per annum. Under his direction the jury gave a verdict for the arrears of the annuity of £400 only.

Shepherd, Serjt., now moved for a new trial, upon the ground that the damages were too small; contending that the "association" intended by the deed was a criminal intercourse; and stating circumstances from which he believed that upon another trial the suspicion of criminal intercourse, even before the separation, would appear to have been unfounded.

THE COURT were clear that this deed had received a perfectly right construction. For it appeared by the evidence that, short of criminal intercourse, Mr F. was a suspected person. The words of the deed were as general as could be; and went much further than the mere exclusion of criminal cohabitation. The intention was to put a stop to all intercourse whatever between these two persons. The receiving a man's visits whenever he chooses to call, is associating with him. The parties had chosen to express themselves in those terms; and the words must receive their common meaning and acceptance.

Rule refused.

[EDITOR'S NOTE. Similarly the "cohabitation" of a husband and a wife has properly the wide meaning of their living in conjugal association, rather than the narrow one of their habitually dwelling in the same house. Hence "married domestic servants, who cannot live day and night under the same roof, may yet 'cohabit' together in the wider sense of the term"; *per* Sir F. H. Jeune (66 L.J.R., Prob. 32).]

HART v. STANDARD MARINE INSURANCE CO. LD.

QUEEN'S BENCH DIVISION. 1889.

L.R. 22 Q.B.D. 499.

[But circumstances may shew that a peculiar meaning was intended.]

THE action was brought on a policy of insurance on a ship, effected by the plaintiff with the defendants, who were under-writers; to recover for a partial loss.

The policy contained the following clause: "Warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage." On the voyage during which the loss arose the ship carried, in addition to parcels of sheet iron and iron rails, a quantity of steel blooms, the weight of which exceeded the net registered tonnage. The question at the trial was whether there had been a breach of the warranty. Mathew, J., decided that steel was wrought "iron" so as to come within the meaning of the contract; and gave judgment for the defendants.

The plaintiff appealed.

Bigham, Q.C., for the appellant. The warranty is express, and it must be construed according to the meaning attached to the words by business men, and does not bind the insured beyond the commercial import of the words....In a business transaction different things are described by the words "steel" and "iron." A contract for steel rails would not be fulfilled by delivery of iron; and an insurance on steel rails would not cover iron rails. *Scott v. Bourdillion* (2 B. & P., N.R., 213)....

BOWEN, L.J. I feel no doubt that the decision was perfectly right. The same broad rules of construction apply to the interpretation of a warranty as apply to all commercial documents. I do not think there is a better exposition of this than is given by Lord Eldon in *Robertson v. French* (4 East, at p. 135). "The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it. These terms are themselves to be understood in their plain, ordinary and popular sense; unless they have generally in respect of the subject matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." It is to be remembered in construing such a document that it is a commercial one used for insurance purposes. And coming to this particular policy, what are the words we have to construe? Not words describing the subject matter to be carried, nor subject matter to be sold or delivered, but a clause, the object of which is to exclude from the ship goods the carriage of which would be dangerous to the ship. There is no business man who is not aware that steel is iron that has been subject to a process. On the other hand, no one would suppose that "steel" included iron. The first question then is, what is the meaning of the word "iron" used in this context? There was evidence to shew that in contracts of sale, bills of lading, and charterparties, business men would not describe or identify steel as iron. It is natural enough that in describing individual matters of commercial contract such matters should be described specifically; and if for the purpose of insurance it is necessary to describe steel specifically, the term "iron" would be inappropriate. In this case there is no such desire to describe specifically or to identify goods, but to exclude generally a certain class of cargo having certain physical qualities from the ship; and in such a case one would expect to find a generic term and not a specific description. I should, therefore, construe the word "iron" in such a clause in its generic sense, and as comprehending a cargo of steel.

FRY, L.J....In an *affirmative* description of some subject matter the mind inclines to be specific; but in the case of exclusion the mind naturally tends to the use of general terms. In this case, which is one of exclusion, there is no evidence which tends to cut down or restrict the ordinary and general scope of the words. Therefore, for the purposes of this warranty, "iron" in its wide and general sense includes that which is described specifically as "steel."

Appeal dismissed.

[EDITOR'S NOTE. Thus, as Lord Maclesfield said, in *Hyde v. Skinner* (2 P. Wms. 196), "The *executors* of every person are implied in himself." Hence a provision about "the acceptor" of a bill would include the acceptor's executors or administrators.]

SMITH AND ANOTHER v. WILSON.

KING'S BENCH. 1832.

3 B. & Ad. 728.

[*Parol evidence may shew a peculiar customary meaning of a word.*]

THIS was an action for the breach of the following covenant in a lease, whereby the defendant demised to the plaintiffs, *inter alia*, a warren: "That at the expiration of the term, they, the plaintiffs, would leave on the warren 10,000 rabbits or conies, the defendant paying £60 per thousand for the same; and for any more than that number at that rate; the number to be estimated by two indifferent persons, one to be chosen by each party." Averment that, at the expiration of the term, the plaintiff left more than 10,000, to wit, 19,200 rabbits upon the warren, but that the defendant would not pay for the same. Plea, *non est factum*. At the trial before Garrow, B., it appeared that, at the expiration of the term, the number of rabbits on the warren was estimated by two indifferent persons chosen by the parties, to be 1600 dozen. It was contended for the defendant, that, according to the custom of the country, the 1600 dozen should be computed at 100 dozen to the thousand; and therefore, that the defendant was liable to pay but for 16,000 rabbits. On the other hand, it was insisted for the plaintiffs, that the words *per thousand* must be understood in the ordinary sense, and that the defendant ought to pay for 19,200 rabbits, being 1600 dozen. The defendant paid into Court a sufficient sum to pay for 16,000 rabbits. Evidence was offered by the defendant to shew that the term *thousand*, as applied to rabbits, meant, in that part of the country, 100 dozen. This evidence was objected to, but received by the learned Judge: and he directed the jury to find for the defendant, if they thought it was proved that the word *thousand*, as applied to rabbits, meant 100 dozen. A verdict having been found for the defendant, a rule *nisi* was obtained for a new trial, on the ground that the evidence had been improperly received....

Kelly, for plaintiff. The general rule is that parol evidence is not admissible to explain a written instrument; and in *Anderson v. Pitcher* (2 B. & P. 168), Lord Eldon regretted that the practice had obtained of receiving such evidence, even as to policies of insurance.... The words of the covenant must be construed in their ordinary sense. The ambiguity, if any, is at all events latent; it is produced by something extrinsic or collateral to the instrument. The covenant, however, will have an operation if the parol evidence is not received; and then, according to *Doe dem. Chichester v. Oxenden* (3 Taunt. 147), such evidence is not admissible. To say, in the present case, that a *thousand* means *twelve hundred*, is not to explain but to contradict the deed. In *Hockin v. Cooke* (4 T. R. 314), proof that the defendant agreed to sell so many bushels of corn according to a particular measure, was held not to support an allegation in a declaration that he undertook to sell so many bushels; because "bushels," without any other explanation, meant a bushel by statute measure.

* * * * *

LITTLEDALE, J. Words denoting quantity are undoubtedly to be understood in their ordinary sense, where no specific meaning is given

to them by Statute or custom. But here the ordinary meaning of the word *thousand*, as applied to rabbits, in the place where the contract was made, was one hundred dozen. The word *hundred* does not necessarily denote that number of units, for one hundred and twelve pounds is called a *hundredweight*; and, where that term is used with reference to ling or cod, it denotes *six* score. There being therefore no precise meaning affixed by the legislature¹ to the word *thousand* as applied to rabbits, I think that parol evidence was admissible to shew that in the country where the contract was made the word *thousand* meant one hundred dozen.

TAUNTON, J. Words denoting weight, or measure, or number, must undoubtedly be understood in their ordinary sense; unless some specific meaning be prescribed to them by Statute, or given by custom. Mercantile instruments have long been expounded according to the usage and custom of merchants, ascertained by parol evidence. I think, on the same principle, the term *thousand*, which in this lease is applied to the subject of rabbits, may be explained, by the custom of the country, to mean twelve hundred; and that parol evidence was admissible for this purpose.

Rule discharged.

[EDITOR'S NOTE. "A well known rule of law," said Lord Cairns (L.R. 2 App. Ca. at p. 468) "admits parol evidence—not to contradict a document, but—to explain the words in it; to supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used." Cf. *Brown v. Byrne* (*infra* p. 479).]

HEWET v. PAINTER.

KING'S BENCH. 1611.

1 BULSTRODE, 174.

[A customary meaning. *Optimus interpret Consuetudo.*]

IN an action of debt upon a bond, the defendant demands oyer of the bond and of the condition. The condition of the bond was that the obligors were to pay all such sums of money for tithes which should be levied. And upon the oyer of the condition, the defendant demurred in law; and the question was touching the exposition of the words "which shall be levied"; whether these words shall not be construed, in this manner, "levied or to be levied"; and also whether "levied," "taxed," or "assessed," shall not be said, in construction of law, to be all one.

[*By counsel*] it was urged that words shall be taken and construed according to the intent of the parties. And intention, and construction of words, shall be taken according to the vulgar and usual sense and manner of speech within these places where the words are spoken (as in Lincolnshire, where eight strikes² make a bushel). The Judges of the common law are to take notice of particular usages in several places; as of London measure in buying of cloth there. And so the particular

¹ [EDITOR'S NOTE. The legislature, by 31 Edw. 3, st. 2, c. 2, affixed to the word "thousand," as applied to herrings, the meaning of ten hundreds of six score each.

On the effect of proving a custom, cf. *Couturier v. Hastie* (*supra*, p. 231), *Scott v. Littledale* (*supra*, p. 236), *Parker v. Ibbetson* (*supra*, p. 353).]

² [EDITOR'S NOTE. Properly, the strike and the bushel are identical.]

usage and the manner of speech in particular countries is to be respected. As in common parlance to say of one, in such a place, that he hath "strained" a mare, this is taken for "distrained," with such an averment of the usage there to be so. If an action upon the case be brought against one for taking "a silver salt," and it was a silver salt-cellar, this was excepted against; but adjudged here that the action was well maintainable, for that this is all one in common speech and parlance. And to this purpose a case was cited to be adjudged in the Common Bench that King Stephen by his letters patent, did grant unto one "Alga maris"; which word *alga* doth signify a weed which came in with the flowing of the sea at a new moon, and was but of small value. This was there ruled to be a good grant of the wreck which the water then brought in with the said weed.

CROKE, J. The demurrer here is not good. The words "taxed," "rated," "levied," idem significant, being all one and to the same purpose and effect. *Alga maris* is a weed which comes in only at the same time with the new moon; there they did make a favourable construction rather than to suffer the grant to be void. So where it is said here "levied," or to be levied, or taxed, this is all one. [In the Yearbook] 9 E. 4, fo. 22, an action of debt brought against one as executor upon an obligation (conditioned that if one T., which was register of the plaintiff and his receiver of divers profits within the Archdeaconry, should truly pay unto him "omnia recepta et recipienda" in the said office, then the said obligation to be void), shews that T. which was his receiver and had received divers sums, had made the defendant his executor. The defendant by way of plea said that he had paid unto the plaintiff all which his testator had received. He was held to give an account for both.

FLEMMING, C.J., and WILLIAMS, J., agreed herein that this goeth unto both; "recepta et recipienda."

FLEMMING, C.J. "Levied," that is, to be levied; and, according to the custom of the country, taken for "taxed." He shall be bound by this to pay all such sums of money as the Sheriff shall levy. By this is to be understood all such sums of money as shall come to the Sheriff to be levied. In *Mallerye's Case* (5 Coke, 111), an Abbot and his Convent made a lease for years, reserving rent yearly to him "or his successors," [it was held] that this shall be taken and construed "him *and* his successors"; "or" there taken for "and." As touching construction of words, they shall be taken, according to the common parlance, phrase, and custom of speech where the words are spoken. The meaning and intent of parties, is to be observed; and to this purpose Fitzherbert (27 H. 8. fo. 27*b*) puts the case [which he had seen decided] that two do make a contract for eighteen barrels of ale for a certain sum of money, and he which bought the barrels of ale would have had into his bargain the barrels also when the ale was spent. It was adjudged that he should not have the barrels; for that the common usage was that the vendor should have his barrels again, and the intent of the parties never was that the vendee should have the barrels, but only the ale. So if a man do covenant with another that, if he comes to his house, he will give him a cup of wine, if he come

he shall not have the cup also; for that this was never the intent of the party. The case remembered of *Alga maris* was this: King Stephen, by his letters patent did grant unto such a town, near the sea, "*Alga maris*"; which as Virgil observeth is a weed growing in the sea, having leaf like unto sea grass or sea weed, being very bitter and sharp. Which word did import a grant of the wreck. For words are to be taken according to the intent of the parties. And this intention and construction of words shall be taken according to the vulgar and usual sense, phrase, and manner of speech of these words, and of that place where the words are spoken; as in the case, before remembered, of "straining" of a mare taken for "distraining." An action upon the case was brought for words spoken by the defendant of the plaintiff—that he was "mainsworn." These words were taken and construed according to the common parlance of the place where the words were spoken; and so to be all one with "foresworn." And so was it accordingly adjudged in the Court of Common Bench in the case of *Alga maris*. So in the principal case here, "to pay all such sums of money which should be levied," the same is to be so construed and understood. "Levied," or "*to be levied, taxed or assessed,*" this is all one. Which sums the defendant here in this principal case was to pay, by the condition of this bond.

The demurrer overruled by the Court, the defendant having no just cause to demur, but the plaintiff a good cause of action.

Judgment for plaintiff.

HENDERSON v. ARTHUR.

COURT OF APPEAL. 1906.

L.R. [1907] 1 K.B. 10.

[Parol evidence cannot contradict a written contract.]

APPEAL from the judgment of Lord Alverstone, C.J., in an action tried by him without a jury.

The action was by lessor against lessee for a quarter's rent upon a covenant in a lease for payment of rent. By indenture of lease, dated November 28, 1904, the plaintiff had demised a theatre to the defendant, to hold for the term of fourteen years, "yielding and paying therefor during the said term the yearly rent of £2500...to be paid in advance during the said term by equal quarterly payments" on the days specified in the lease; and the defendant covenanted with the plaintiff to "pay the said yearly rent hereby reserved at the times and in manner hereinbefore appointed." The defence set up was that, by a parol agreement made between the plaintiff and the defendant antecedently to the execution of the lease, the plaintiff had agreed to take a bill, payable at three months, by way of payment of each quarter's rent in advance as it became due; and that the defendant had, in accordance with that agreement, tendered to the plaintiff his acceptance for the rent sued for, which the plaintiff refused to take. Evidence of the antecedent agreement was tendered by the defendant, but was objected to by the plaintiff's counsel as inadmissible. No claim was set up by the defendant for

rectification of the lease. The Lord Chief Justice admitted the evidence, and, finding that the alleged agreement was proved¹, gave judgment for the defendant.

Rose-Innes, for the defendant. The agreement in question does not contradict the lease so as to be inadmissible. The lease says nothing as to mode of payment. Payment does not necessarily mean payment in cash. Payment by bill is a mode of payment well known in business matters; and it may be called a payment "in advance," for the plaintiff can obtain his money by discounting the bill. The agreement is admissible to shew in what sense the parties used the word "pay" in the lease; that word being susceptible of more than one meaning. It would be unjust that, when, as a condition of the defendant's entering into the lease, there was a stipulation that payment by bill should be accepted as payment in advance under it, the defendant should be held bound to pay in cash....

COLLINS, M.R.... Assuming that there was in fact such an agreement, the question is whether it is legally available for the purpose of defeating the claim of the lessor upon the covenant. It seems to me that to admit evidence of such an agreement as being so available would be to violate one of the first principles of the law of evidence. Because, in my opinion, it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject-matter. I do not see how, in this case, the covenant in the lease and the antecedent parol agreement can co-exist; and the subsequent deed has the effect of wiping out any previous agreement dealing with the same subject-matter. It was somewhat faintly suggested that the agreement relied upon was a collateral agreement in the nature of a condition upon which the lease was entered into by the defendant. But it appears to me, when the terms of the agreement are looked at, that it is not a merely collateral agreement, but provides in another and contradictory manner for doing what was subsequently provided for by the lease. Under these circumstances I think that the agreement relied upon was not admissible in evidence, and that the appeal must therefore be allowed.

FARWELL, L.J. I agree. The Lord Chief Justice appears to have held that "pay," in the covenant to pay rent, was an ambiguous expression and might mean either payment in cash or by bill; and he appears to have admitted parol evidence on this footing. If that contention were correct, modern conveyancers are less wise than their fathers in discarding the old familiar form of "well in hand truly pay in lawful money of Great Britain" from covenants to pay rent. But such contention is inconsistent with the decision in *Davis v. Gyde* (2 A. & E. 623), as explained by Maule, J., in *Belshaw v. Bush* (11 C.B. 191)....

Appeal allowed.

¹ The plaintiff denied that there had been such an agreement as alleged, and appealed against this finding, but it became unnecessary to discuss this question, as the Court of Appeal held that the existence of such an agreement would be immaterial.

[EDITOR'S NOTE. In *Burges v. Wickham* (3 B. & S. at p. 696), Blackburn, J., thus stated the principle: "According to the general law of England, the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties. Incidents may be annexed by the general law of the land or by a general custom; but such incidents, though not actually written in the contract are considered to be tacitly included in it. The warranty of seaworthiness implied by the general law of England in every voyage-policy, is as much a part of that policy as if there were written in it 'Warranted seaworthy.'" Cf. *Kelner v. Baxter*, *supra*, p. 326.

Accordingly in an action by the drawer of a bill of exchange against the acceptor, the latter cannot shew that, when the bill was accepted, there was an oral agreement that at maturity it should be renewed instead of being paid. For that would contradict the date which the bill specifies for payment. *New London C.S. Ld. v. Neale* (L.R. [1898] 2 Q.B. 487.)

JEFFERY v. WALTON.

NISI PRIUS. 1816.

I STARKIE 267.

[*Nor can a writing that states even merely part of a contract be contradicted by parol evidence. But it may be supplemented by it.*]

ASSUMPSIT for not taking proper care of a gelding let by the plaintiff to the defendant; and to recover twelve guineas as the stipulated hire of the gelding.

[The defendant paid into court the twelve guineas.]

It appeared by the evidence of two witnesses, called by the plaintiff, that a son of the defendant applied to the plaintiff (who was a dealer in horses and also let horses to hire) for the loan of a horse. The latter told him that he had no horses at home, except such as were for sale; but said that he had a black horse who shied, and that if he took him on hire he must be liable for all accidents. The defendant's son engaged him on these terms at the rate of two guineas a week, for six weeks at least. It also appeared that, whilst the horse was in the defendant's possession, he came down upon the road, in consequence of shying, and suffered a material injury in having a fetlock severely cut by a glass bottle.

Upon the cross-examination of the plaintiff's witnesses, it appeared that, after the agreement had been made, some memorandum had been entered in pencil upon a card which the plaintiff had kept.

Walton, for the defendant, contended that it was incumbent on the plaintiff to produce this.

Scarlett, for the plaintiff, did not object to produce it; but contended that it was to be considered as part of the defendant's evidence.

LORD ELLENBOROUGH. No, it is part of your case if it contains a memorandum of the contract. The only question is, whether it contains the contract; if that had clearly appeared in evidence, I should have shut out the parol evidence long ago.

The card was then produced, on which was written the following memorandum: "Six weeks at two guineas, William Walton, junior."

Walton, for the defendant, then contended that this was to be considered as the real contract between the parties, having been made

(according to the evidence) immediately upon the close of the agreement; and that it was not competent to the plaintiff to engraft upon it a further term by means of parol evidence. And consequently that this was nothing more than an ordinary case of hiring; in which accidents of this nature were to be borne by the person who let the horse.

LORD ELLENBOROUGH. The written agreement merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms. But I am of opinion, that it is competent to the plaintiff to give in evidence suppletory matter, as part of the agreement.

Verdict for plaintiff.

[EDITOR'S NOTE. "Where words have a clear definite meaning," said Lord Cranworth (7 H.L.C. at p. 680), "no evidence can be admitted to explain or control them. Thus a demise of 'my messuage in Dale' could not by any parol evidence be shewn to have been meant to describe—not a messuage, but—a sheet of water."]

HARRIS AND OTHERS v. RICKETT.

COURT OF EXCHEQUER. 1859.

4 H. & N. 1.

[Parol evidence may supplement a writing that was not intended to express the whole contract.]

[FORMAN borrowed £200 from Rickett on Feb. 17, 1858; and handed to Rickett a promissory note for £200, and an agreement to pay higher interest than was stipulated for in the note, and a memorandum of agreement to assign to him a policy of insurance and a certain reversionary interest as security for the loan; and also promised *orally* to execute in his favour a bill of sale of certain furniture and stock in trade. On April 12, Rickett asked for the bill of sale; and Forman executed it. Rickett took possession of the goods under it on April 17; and on April 21, Forman signed a declaration of insolvency.

The assignees in Forman's bankruptcy brought this action to recover the goods. Cockburn, C.J., told the jury to find for the defendant if they thought that, when the money was advanced, the bankrupt had promised to give a bill of sale. They did find for him.]

* * * * *

Hayes, Serjt., moved to enter a verdict for the plaintiff....The written agreement as to the policy and reversionary interest is inconsistent with the verbal agreement sought to be set up. Evidence of the verbal agreement would vary and contradict the written agreement....

POLLOCK, C.B....The jury have found that it was agreed to give the bill of sale. They have not found, nor does it appear to us, that the writing was intended to contain the whole agreement. We are of opinion that the rule relied on by the plaintiffs applies only where the parties to an agreement reduce it to writing, and agree (or intend) that that writing shall be their agreement.

PYM v. CAMPBELL AND OTHERS.

QUEEN'S BENCH. 1856.

6 E. & B. 370.

[*Parol evidence may shew that even a writing purporting to be a complete contract was not meant to operate as such.*]

[ACTION on an agreement for sale of three-eighths of the benefits to accrue from an invention of the plaintiff's. Plea, Non assumpsit. At the trial the plaintiff produced an agreement signed by himself and the defendants. The defendants gave evidence that plaintiff and they, having negotiated as to the purchase, agreed on the terms desirable; and wrote them down. All parties signed the paper, and the plaintiff took it away. It was arranged that they and a Mr Abernethie, an engineering expert, should meet. If he then approved of the proposed machine they would make a bargain on those terms. But if Abernethie did not approve of the invention, there should be no bargain at all. Abernethie, when he saw the invention, disapproved of it.]

The Lord Chief Justice told the jury that, if they were satisfied that, before the paper was signed, it was agreed amongst them all that it should not operate as an agreement until Abernethie approved of the invention, they should find for the defendants on the plea denying the agreement. Verdict for the defendants.

Thomas, Serjt., moved for a new trial on the ground of misdirection. The very object of reducing a contract to writing, and signing it, is to prevent all disputes as to the terms of the contract. Here the attempt is to shew by parol that the agreement to take this invention was subject to a condition that Abernethie should approve; while the writing is silent as to that. *Davis v. Jones* (17 C.B. 625) [a ruling that where a written agreement to let a house "for three years" was silent as to the date from which they were to run, parol evidence was admissible to shew that they were not to run until the house had been repaired¹] proceeded on the ground that the instrument was imperfect. The similar cases as to bills of exchange proceed upon the necessity that there should be a delivery to make an indorsement; *Marston v. Allen* (8 M. & W. 494)....

ERLE, J....The point made is, that this is a written agreement, absolute on the face of it; and that evidence was admitted to shew it was conditional. If that had been so, it would have been wrong. But I am of opinion that the evidence shewed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement. And, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive; and cannot be varied by parol evidence. But in the present case the defence begins one step earlier. The parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement

¹ [EDITOR'S NOTE. But for this evidence they would have been presumed to run from the date of the writing; cf. *Williams v. Jones* (*infra*, p. 473).]

until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion. But, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is: that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible.

CROMPTON, J. I also think that the point in this case was properly left to the jury. If the parties had come to an agreement, though subject to a condition not shewn in the agreement, they could not shew the condition. Because the agreement on the face of the writing would have been absolute, and could not be varied. But the finding of the jury is that this paper was signed on the terms that it was to be an agreement if Abernethie approved of the invention, not otherwise. I know of no rule of law to estop parties from shewing that a paper, purporting to be a signed agreement, was in fact signed by mistake; or that it was signed on the terms that it should not be an agreement till money was paid, or something else done. When the instrument is under seal it cannot be a deed until there is a delivery; and when there is a delivery that estops the parties to the deed; (that is a technical reason why a deed cannot be delivered as an escrow to the other party). But parol contracts, whether by word of mouth or in writing, do not estop; there is no distinction between them, except that where there is a writing it is the record of the contract. The decision in *Davis v. Jones* is, I think, sound law, and proceeds on a just distinction: the parties may not vary a written agreement; but they may shew that...the signed paper was never intended to be the record of the terms of the agreement. Evidence to shew *that* does not vary an agreement, and is admissible.

New trial refused.

[EDITOR'S NOTE. *Pym v. Campbell* was followed and applied in *Pattle v. Hornbrook* (L.R. [1897] 1 Ch. 25).

In *Wake v. Harrop* (6 H. & N. at p. 775) Bramwell, B., puts the matter thus vividly: "When the parties have recorded their contract, the rule is that they cannot vary it by parol evidence....But it is always open to them to shew whether or not the written document is the binding record of the contract. Suppose agreements were prepared for the sale of two horses, one for £50 and the other for £100; and the buyer of one horse signed by mistake the contract for the other....Again, suppose a person, intending to become witness to a contract, signed his name in the wrong place and appeared to be a principal. The mistake might be shewn."]

WILLIAMS v. JONES.

KING'S BENCH. 1826.

5 B. & C. 108.

[*Parol evidence is admissible to prove even a written agreement to be illegal.*]

ASSUMPSIT upon an agreement, dated 11th November, 1822, whereby plaintiff, "in consideration of £250 paid by the defendant, and of £100 to be paid by defendant within two years from the date thereof, agreed

to take T. Jones, the defendant's son, into partnership with plaintiff, as attorneys and solicitors, and to give him a moiety of the profits of the partnership, and of the profits arising from the Hundred Court of Werrall (of which the plaintiff was lord), and a moiety of the royalties." The partnership to continue for ten years. Breach, non-payment of the £100. Plea, non-assumpsit. At the trial the plaintiff proved the agreement as set out in the declaration. But it appeared by the cross-examination of his witnesses that the defendant's son was not admitted an attorney until April, 1823. For the defendant it was contended that the agreement was illegal; as constituting a partnership between an attorney and a person who had not at that time been admitted. For the plaintiff evidence was offered that the agreement was not put in force before the admission of the defendant's son. The learned Judge thought the evidence inadmissible, and directed a nonsuit.

Cross, Serjt., moved for a new trial. No time being fixed for the commencement of the partnership, it was open to the plaintiff to give parol evidence upon that point. The contract, upon the face of it, was perfectly legal; the defendant sought to impeach the legality of it by parol evidence that the defendant's son was not at the date of the contract an attorney. It was, therefore, but reasonable that the plaintiff should be allowed by testimony of the like nature to answer the presumption of illegality so raised, by shewing that the agreement was not to take effect until after the party had been duly admitted. The agreement contains reference to the date, in order to fix the time of payment; but no such reference is made to point out the commencement of the proposed partnership.

BAYLEY, J. Where a written contract has been entered into, the Court must look to that in order to ascertain the meaning of the parties; and we are not at liberty to admit the introduction of parol evidence to shew that the agreement was in reality different from that which it purports to be. The declaration in this case describes the contract as forming a partnership to commence *in praesenti*, and as made between parties, then attorneys; and the agreement corresponds with the description given in the declaration. It is described as an absolute contract. But it is now contended that it was conditional, to commence *in futuro* if T. Jones should be admitted an attorney. But it is impossible to put such a construction upon it. Here, then, there was a bargain giving a present share of the profits of an attorney's business to a person not admitted; that was illegal, according to the 22 G. 2, c. 46, s. 11. And even if the evidence had been admissible, to shew that the agreement was to take effect *in futuro*, the agreement as proved would not correspond with the description of it in the declaration. And on that ground the nonsuit would be right.

HOLROYD, J. I am of opinion that the nonsuit in this case was right. Whatever may have been the intent of the parties, which I collect to have been that the instrument should take effect immediately, at all events the law gives it that effect; no time for its commencement being mentioned in the instrument. Parol evidence was properly admitted to shew that the agreement was illegal; but not for the purpose of varying

the contract, by adding to or diminishing from it. It is contended for the plaintiff that evidence should have been admitted, which certainly would have shewn the contract not to be illegal, but would at the same time have shewn it to be different from the legal import of the instrument declared upon. If the evidence had merely gone to rebut the illegality, I should have thought it admissible. But it went further, and then two objections arose to it. First, it went to shew that an agreement apparently absolute was really conditional. Secondly, its effect was to add by parol to an agreement which, according to *Boydell v. Drummond* (11 East 142) could not be valid unless in writing; inasmuch as it was not to be performed within a year from the making of it¹.

New trial refused.

CLAYTON v. LORD NUGENT AND OTHERS.

EXCHEQUER. 1844.

13 M. & W. 200.

[*An ambiguity that is patent in the words of a writing cannot be explained by parol evidence.*]

[SIR GILBERT EAST wrote his will on various pages of a book, at different times. Part of it was duly executed in 1820, and the other part in 1827. No devisees were mentioned by name, but the testator's estates were devised "first to *K*, then to —, then to *L*, then to *M*, then to *N*, then to *O*, then to *P*, then to *Q*, then to *V*." On a slip of paper pasted into the book, and forming part of the will at the time of the attestation in 1820, the testator stated that "the key and index to the letter, initials," etc., was in a brown leather writing-case in the drawer of his writing-desk, on a card. The testator died on December 11th, 1828. On that day a card in his handwriting, signed by him, was found in a brown leather writing-case in that writing-desk, dated January 30th, 1828. It explained the above-mentioned initials and others; e.g. "*K* signifies Eleanor Mary East; *L* signifies Gilbert East Clayton; *M* signifies second son of William Robert Clayton"; etc., etc. A witness proved that, two years before the testator's death, he had seen a card with writing on it lying before the testator together with the book containing the will, and the card found in 1828 appeared to him to be similar to the one seen.

By a decree of the High Court of Chancery it was ordered that certain parties to a suit then depending should proceed to a trial at law in the Court of Exchequer; on the issue whether or not Sir Gilbert East, Bart., devised his freehold hereditaments in the county of Suffolk to the plaintiff, H. H. O'Donel Clayton, the second son of Sir William Robert Clayton.

On the trial, before Lord Abinger, C.B., the jury found that the card discovered in 1828 did not exist before the execution of Sir G. East's will. A verdict was accordingly entered for the defendants, subject to the opinion of the Court as to whether the card, though made after the will had been executed, was not nevertheless admissible as evidence of the testator's intentions.]

¹ EDITOR'S NOTE. Cf. p. 106 *supra*.

Malins, for plaintiff....This is not the case of a mere *blank*; which would be a patent ambiguity and could not be supplied by parol evidence. In *Doe d. Allen v. Allen* (5 M. & W. 368), where there was a devise to *John Allen*, there being two persons of that name, both of whom answered in other respects the description in the will, evidence of the declarations of the testator, made after the execution of the will, was admitted to shew which of the two he intended as the object of his bounty....

[ROLFE, B. That was clearly a case of *latent* ambiguity.]

ALDERSON, B. Where a will is certain on the face of it, but you introduce some uncertainty by parol evidence of the state of the testator's family, or other circumstances, you may remove that uncertainty in the same manner. But here the ambiguity is on the face of the will itself; and you are making a will by parol evidence, and not merely explaining it.]...

ALDERSON, B....To define that which is indefinite is to make a material addition to the will. Now, if a devise to "*M*" be not indefinite—if it be not an ambiguity—I know not what an ambiguity is. This, therefore, is a case of a *patent* ambiguity; in which, according to all the authorities on this subject, parol evidence to explain the meaning of the will cannot legally be admitted....The testator has left his property to some persons whom he designates by the letters *M*, *O*, *K*, and others. But what persons he meant, at the time of making his will, to designate by those letters, it is impossible to guess. The case of a will written in cipher is quite different; because words on paper are but the means by which a person expresses his meaning, and short-hand is, in this respect, like long-hand, and equally admits of interpretation. But, on the face of the will before us, what is there to shew what these letters, *M*, *K*, *L* and the rest of them, denote?...The testator makes a will which, on the face of it, is altogether unintelligible. And we cannot apply the key, which was not shewn to be in existence until long afterwards, to shew what he meant at the time of the execution of his will; for that would be allowing the key to make the will. That key is not admissible for any purpose; for it certainly is not evidence to shew the contents of the old card, even admitting a previous card of the same nature to have existed, which is by no means clear.

ROLFE, B....In *Abbott v. Massie* (3 Ves. 148) [where a legacy had been left to "*Mrs G.*"], evidence was allowed to be given to shew who "*Mrs G.*" was. The testator meant somebody whom he was in the habit of calling "*Mrs G.*" The present case would resemble that, if there had been evidence that Sir Gilbert East was accustomed to call his nephew by the name of "*M.*" The case, however, is not put upon that ground. The same observation applies to *Price v. Page* (4 Ves. 680) [where a legacy was left to "*— Price, the son of — Price*"]. Intimate friends are in the habit of calling each other by their surnames only: evidence therefore may be given to prove who is meant by a person so designated. But the case of a blank, or an unexplained cipher, is very different. For there the ambiguity appears on the face of the will itself; and to suffer it to be explained by evidence of other statements of the testator, would

be to repeal the Statute of Frauds. The plaintiff, therefore, has failed to establish that he was the devisee of the estates in question.

Judgment for defendants.

[EDITOR'S NOTE. Were parol evidence receivable to remove a patent ambiguity "no man could advise his client or know the certainty of any Will. For if otherwise than what appears written might be averred, one Will might appear in writing, and quite another upon evidence"; *per* Raymond, J. (1 Sir T. Raymond at p. 411).

Hence "if a devise be 'to one of the sons of J. S.', who has several sons, the devise is void, and shall not be supplied by any parol proof"; *per* Tracy, J. (2 Vernon 624).]

PADDOCK v. FRADLEY AND BUCKLEY.

EXCHEQUER. 1830.

1 Cr. & J. 90.

[Parol evidence may explain a latent ambiguity; e.g., in the description of the subject matter of a contract.]

TRESPASS for breaking a close called Big Brian's Wood and carrying away clay and marl. Pleas, first, not guilty, secondly, leave and licence.

At the trial, the plaintiff having proved a *prima facie* case, the defendants gave in evidence an agreement dated the 10th September, 1827, made between the plaintiff of the one part, and Joseph Fradley and John Fradley, therein described as brickmakers, of the other part. Thereby the plaintiff, in consideration of the rents and agreements thereafter mentioned, promised and agreed to and with the said John Fradley and Joseph Fradley, that he the said plaintiff should and would, at the then next general or some special court baron of the lord of the manor of Newcastle-under-Lyme, surrender into the hands of the lord of the said manor, by the rod or otherwise according to the custom thereof, *all those brickworks, being copyhold of inheritance within the said manor, situate at Shelton, then in the possession of the said plaintiff, and also full right, power, and authority to get marl and clay thereout, as well for making bricks, as for sale, To the use of the said John Fradley and Joseph Fradley; for the term of fourteen years from the 25th day of December then next, yielding and paying a yearly rent, etc.* No surrender appeared to have been made, but the defendants had carried on the brickworks for some time under this instrument. The question at the trial was, whether the agreement was intended to extend to the *locus in quo*: the plaintiff contending, and giving evidence to prove, that the agreement was confined to a close which he called Little Brian's Wood, where the old brickworks had been, and that it did not extend to the *locus in quo*, which he called Big Brian's Wood; the defendants contending that the *locus in quo* was comprehended in the agreement.

The defendants called Joseph Fradley, for the purpose of proving, amongst other things, declarations made by the plaintiff, when the agreement was entered into, defining the land which the Fradleys were to hold under the agreement, and which included the *locus in quo*. It was objected for the plaintiff...that this evidence was inadmissible to vary the written agreement. The learned Judge received the evidence, and the jury found a verdict for the defendants....

Talfourd moved for a new trial....Evidence of conversation between Joseph Fradley and the plaintiff was not admissible to vary the terms of the written instrument. The agreement was not uncertain. It did not extend to all that Paddock had in the manor, but was restricted to what was then in his own possession. After evidence had been given to shew what was then in his possession, which did not include Big Brian's Wood, parol evidence to shew that more than was then in his possession was intended to pass, was clearly inadmissible. *Doe dem. Brown v. Brown* (11 East 441)....

VAUGHAN, B....It is said, that the witness is not competent to vary the terms of a written agreement. The terms of the agreement are, "all those brickworks now in the possession," etc. It is said that there is no ambiguity in this agreement, that there is nothing to be explained; but that the premises must be confined to what was in the possession of the plaintiff at the time of the agreement; and therefore that no evidence was admissible to extend the premises beyond what was then in his possession. In *Goodtitle dem. Radford v. Southern* (1 M. & S. 299), where a testator devised all his farm, called Trogue's Farm, then in the occupation of A. C., and it appeared that part only of that farm was in the occupation of A. C., parol evidence was admitted to extend the devise to other lands of Trogue's Farm, not in the occupation of A. C. That case, therefore, shews that parol evidence is admissible to explain such an ambiguity as the present. In the present case, it being ambiguous of what the brickworks consisted, it was competent for the defendants to give parol evidence to explain what those were which were intended to be comprised....

BOLLAND, B....In all matters of this description, we must look to the instrument, and to the words of it. If the words are clear, a witness cannot be called to explain the intent; but if they are ambiguous and indeterminate, the instrument may be explained by parol testimony. This instrument is of the latter description, and therefore, in my opinion, the evidence was admissible.

New trial refused.

[EDITOR'S NOTE. Cf. *Raffles v. Wichelhaus* (*supra*, p. 234); *Lyle v. Richards* (*supra*, p. 441); and *Owen v. Thomas* (*infra*, p. 487). Similarly, parol evidence can let in an undisclosed principal; see pp. 332, 341 *supra*.]

SWEETING v. FOWLER.

NISI PRIUS. 1815.

1 STARKIE, 106.

[*Parol evidence may rebut a rule as to the primary interpretation of a latent ambiguity.*]

ASSUMPSIT by Henry Sweeting the younger, on a promissory note, which was payable "to Henry Sweeting," generally.

It appeared that there were two Henry Sweetings, father and son.

BAYLEY, J., held that this was evidence of a promise to Henry Sweeting the father; and not to Henry Sweeting the younger, as stated in the declaration.

The plaintiff then proved that Henry Sweeting the younger had given instructions to bring the action and was in possession of the note.

BAYLEY, J., thought this sufficient. But gave the defendant liberty to move the point.

Verdict for plaintiff.

[EDITOR'S NOTE. Mr Justice Bayley's first ruling was based upon an ancient legal presumption that "If speech be of 'J. S.' generally, it shall be intended of the father, or of the eldest son; for they are the most worthy"; see *Gregory's Case* (6 Co. Rep. 20).]

WIGGLESWORTH v. DALLISON.

KING'S BENCH. 1779.

DOUGLAS, 201.

[Custom may add to a written contract an unexpressed clause.]

[THIS was an action of trespass for cutting and carrying away the plaintiff's corn growing in a field in the parish of Hibaldstow, in Lincolnshire, of which the defendant was the owner but the plaintiff had been the tenant. His lease expired on May 1st, 1776; at which time a crop of corn, sown by him, was growing in the field; but was ultimately cut and carried by the defendant after re-entering as freeholder. The plaintiff alleged a custom in the following words, viz.: "That, within the parish of Hibaldstow, there now is, and from time whereof the memory of man is not to the contrary there hath been, a certain ancient and laudable custom, there used and approved of:—that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath expired on the first day of May in any year, hath been used and accustomed (and of right ought) to have, take, and enjoy, to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped and taken away, his away-going crop; that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant upon any part of such lands, (not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish), and which hath been left standing and growing upon such lands at the expiration of such term of years." The jury found for the custom.

Hill, Serjt., moved in arrest of judgment. Three objections were made by him for the defendants; viz.: 1. That the custom is unreasonable. 2. That it is uncertain. 3. That it is repugnant to the deed under which the plaintiff had held....It was admitted that, in cases where the usual crop of the country is such that it cannot come to maturity in one year, a right to hold over after the end of the term, in a parol demise, may be raised by implication; as where saffron is cultivated in Cambridgeshire; liquorice, near Pontefract; or tobacco, which formerly used to be planted in Lincolnshire. But it was contended that, in such cases, a lease by deed would preclude such implication; as the parties must be supposed to have described all the circumstances relative to the intended tenure in the written instrument.]

* * * * *

LORD MANSFIELD. We have thought of this case, and we are all of opinion that the custom is good. It is just; for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking; as a heriot may be due by custom, although not mentioned in the grant or lease.

Rule discharged.

[The case was carried to the Exchequer Chamber; which pronounced unanimously that the custom was valid, and affirmed the judgment.]

[EDITOR'S NOTE. It was with reluctance that this exception to the general rule was admitted into the law. "It is now too late to say that this warranty is not to be expounded with regard to the usage of trade. Perhaps it is to be lamented that ... parties should not be left to express their own meaning by the terms of the instrument.... It is true that Lord Mansfield expressed himself thus: 'Wherever you render additional words necessary and multiply them, you also multiply doubts and criticisms' (Dougl. 74). Whether, however, it be not true that as much subtlety is raised by the application of Usage to a contract as by the introduction of additional words, might... be reasonably questioned." *Per* Lord Eldon, C.J., in *Anderson v. Pitcher* (2 B. & P. at p. 168).

"In *Wigglesworth v. Dallison* there were not sufficient circumstances to exclude the custom. But unless it appears that there is *nothing* to exclude [the custom] the agreement must regulate the rights of the parties." *Per* Best, J.; (2 B. and Ald. 746).]

BROWN v. BYRNE.

QUEEN'S BENCH. 1854.

3 E. & B. 703.

[Custom may shew that the sum named in the written contract is subject to Discount.]

[A BILL of lading expressed that 110 bales of cotton, shipped at New Orleans, on a vessel belonging to the plaintiff, were deliverable at Liverpool, to order or assigns, "he or they paying freight for the said goods five-eighths of a penny sterling per pound, with five per cent. primage, and average accustomed." By the usual custom in the trade at Liverpool three months' interest or discount is deducted from freights, payable under bills of lading, on goods coming from certain American ports, including New Orleans. The defendant, as assignee of this bill of lading, received the goods. The shipowner claimed £145. 9s. 10d.; being £6. 18s. 7d. for primage¹, and £138. 11s. 3d. for the freight of 53,209 lbs.

¹ [EDITOR'S NOTE. "Primage" is a payment by the owner of cargo for the trouble of loading and unloading it. Formerly it was paid to the captain and crew; but now to the owner of the vessel.]

without any deduction. The defendant claimed to deduct £1. 16s. 3d. as the customary three months' discount; but offered to pay the remainder. The plaintiff contended that the custom was inconsistent with the written document and therefore could not be insisted upon.]

Mellish, for the plaintiff....This is an attempt to say that, in this particular trade, a written contract to pay £145. 9s. 10d. for the carriage of 110 bales of cotton shall, by custom, bind the party to pay £143. 13s. 7d. and no more. Such a custom directly contradicts the written contract.... The principle is laid down in *Blackett v. Royal Exchange Assurance Company* (2 C. & J. at p. 249) by Lord Lyndhurst: "Usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain." If the custom be admissible to shew that "paying freight for the said goods five-eighths of a penny sterling per pound" means paying less than five-eighths of a penny, it seems impossible to exclude custom in any case.

[CROMPTON, J....Suppose that there were a customary allowance in estimating the weight of the pound. That would affect the sum to be paid. In *Bold v. Rayner* (1 M. & W. 343), the bought note was for 100 tons of palm oil "to be taken from the quay at landing weights, with customary allowances." The sold note was simply for 100 tons. At the trial, Parke, B., admitted evidence that there was a custom that palm oil was to be taken from the quay at landing weights, with certain known customary allowances; and he ruled that, this custom being incorporated in the written contract, there was no variance between the bought and sold notes.]

It might be admissible there, as shewing that "ton" does not mean twenty hundredweight; as in *Smith v. Wilson* (*supra*, p. 464), where a hundred rabbits was shewn to mean six-score. It is a case of the translation of a word used in an artificial sense.

* * * * *

COLERIDGE, J....The principles on which this case is to be decided are perfectly clear; the difficulty lies in the application of them to the facts. Mercantile contracts are very commonly framed in a language peculiar to merchants. The intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. Again, in all contracts as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. Evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But in these cases, a restriction is established (on the soundest principle) that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract

is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less. Neither, in the construction of a contract among merchants, tradesmen, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than "a thousand," "a week," "a day"? Yet the cases are familiar in which "a thousand" has been held to mean twelve hundred, "a week" a week only during the theatrical season, "a day" a working day; *Smith v. Wilson* (3 B. & Ad. 728); *Grant v. Maddox* (15 M. & W. 737); *Cochran v. Reiberg* (5 Esp. 121). In such cases the evidence neither adds to nor qualifies nor contradicts the written contract; it only ascertains it, by expounding the language. Here the contract is, to pay freight on delivery at a certain rate per pound. Is it inconsistent with this to allege that, by the custom, the shipowner, on payment, is bound to allow three months' discount? We think not. The written contract expressly settles the rate of payment; the custom does not set this aside. Indeed it adopts it as that upon which it is to act, by establishing a claim for allowance of discount upon freight to be paid after that rate. The consignee undertakes to pay freight on delivery after that rate; the shipowner undertakes to allow three months' discount on freight paid after that rate; the latter contract is dependent on the former, but is not repugnant to it. If the bill of lading had expressed (or if, from the language of it, the intention of the parties could have been collected) that the freight at the specified rate should be paid *free* from all deductions, customary or otherwise, then it would have been repugnant to it to set up the custom; and the case would have been brought within the restriction mentioned above. *Webb v. Plummer* (2 B. & Ald. 746) and *Hutton v. Warren* (1 M. & W. 466) are cases which illustrate this principle.

In the first of these, by the custom of the country the outgoing tenant was bound to do certain acts and entitled to receive certain compensation; but the lease which formed the written contract bound him to do the same acts in substance, and specially provided for his payment as to some of them, omitting the others. The Court held that the expression as to some excluded the implication as to the remainder; and that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned *and no more*. The custom therefore would have been repugnant to the contract.

But in the latter case (in which the former was expressly recognised) the Court held that a specific provision, as to a matter *dehors* the custom, left the custom untouched and in full force. This latter case appears to us like the present: the contract settles the rate of freight. Whether or not discount is to be allowed on the payment, it leaves open; and to that the custom applies.

Judgment for defendant.

NESBITT AND ANOTHER v. LUSHINGTON.

KING'S BENCH. 1792.

4 T.R. 783.

[*Noscitur a sociis. The context may narrow a word, to make it ejusdem generis with others.*]

THIS was an action on a policy of insurance, on wheat and coals on board the *Industry*, Captain Cassidy, from Youghall to Sligo, for £100....The policy was in the usual form, and the perils insured against were "the seas, men of war, fire, enemies, *pirates*, rovers, thieves, jettizons, letters of mark and countermark, surprisals, takings at sea, *arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever.*"...

It appeared in evidence that the ship was forced by stress of weather into Elly Harbour, in Ireland. There happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she was stranded. They would not leave her till they had compelled the captain to sell all the corn (except about 10 tons) at a certain rate, which was about three-fourths of the invoice price....The jury found a verdict for plaintiffs...[A motion was made to set aside the verdict.]

Erskine shewed cause against this....The loss in question falls under one or other of two risks insured against by the policy. Either that of arrests, etc. "of all kings, princes, and *people*"; in which the word *people* must be understood as contradistinguished from the magistracy of a country, which is denoted by the words *kings and princes*. That construction is much strengthened by what follows the word *people*, namely, "of what nation, condition, or quality soever": that cannot apply to whole nations so aptly as to particular individuals. During the American war, in cases of capture by their vessels, they were described as made *by persons unknown*, and no objection was ever taken: which shews this to be the sense in which they were understood at that time. Or else this is a capture by pirates, and loss by "pirates" is expressly insured against. Whatever would be robbery at land is piracy at sea. Obliging the owners of corn by force to sell it on shore for a particular price imposed by the buyers themselves, would certainly be robbery....

* * * * *

LORD KENYON, C.J. That which happened in this case does not fall within the meaning of "arrests, restraints, and detainments of kings, princes, and people." The meaning of the word "people," may be discovered here by the accompanying words: *noscitur a sociis*. It means "the ruling power of the country."

But I think that this loss falls within a capture by pirates....

BULLER, J....Neither can I agree with the construction put at the bar upon the word "people." It means "the supreme power"; "the power of the country," whatever it may be. This appears clear from

another part of the policy. For where the underwriters insure against the wrongful acts of individuals, they describe them by the names of "pirates, rogues, thieves": then, having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of "kings, princes, and *people*, of what nation, condition, or quality soever." Those words therefore must apply to "nations," in their collective capacity.

THORPE v. THORPE.

COMMON PLEAS. 1696.

1 LORD RAYMOND 235.

[*General words that follow particular ones are presumably limited to subjects of the same genus as those particularised.*]

THE plaintiff brings *assumpsit* against the defendant for £7; and declares that whereas he had mortgaged to the defendant certain copyhold lands, redeemable upon the payment of such a sum of money, the defendant, in consideration that the plaintiff would release to the defendant his equity of redemption, assumed to pay to the plaintiff £7. The plaintiff avers that he did release his equity of redemption; but that the defendant has not paid the £7. The defendant pleads this release in bar of the action, because after the words "equity of redemption" the scrivener had added "and all actions, duties and demands." The plaintiff demurs. And the question was, whether this £7 was released by these general words?

PER CURIAM. Adjudged that this duty of the £7 was not extinct. For where there are general words only in a release, they shall be taken most strongly against the releasor; as where a release is made to *A* and *B* of "all actions," it releases all several actions which the releasor has against them, as well as all joint actions. So if an executor releases "all actions," it will extend to all actions that he hath in both rights. But where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words.

POWELL, J., cited a case, *Knight v. Cole* (1 Show. 150), in which case he was counsel. The case was thus: *A* recovered against *B* a judgment for £6000 and made J. S. and J. D. his executors, and died. *B* made *C* his executor; and devised a legacy of £5 to J. D. and died. J. D. by deed acknowledged the receipt of the £5 of *C*; and thereby released "the said legacy, and all actions, suits and demands, which he had against *C* as executor to *B*." And after argument in the King's Bench it was adjudged that nothing was released but the £5.

Judgment for plaintiff.

[EDITOR'S NOTE. "General words are limited by the immediately preceding particular words unless there is something on the face of the instrument which ought to lead one to refuse to apply the *Ejusdem generis* rule....The true rule is that the restricted meaning is the one which primarily applies;...[not the supposed rule that] the general words have their natural meaning unlimited by the preceding words unless you find something within the four corners of the document which compels you to take another view." *Per* Vaughan Williams, L.J., in *Tillmanns v. S. S. Knutsford* (L.R. [1908] 2 K.B. at pp. 398, 401).]

LARSEN v. SYLVESTER & CO.

HOUSE OF LORDS. 1908.

L.R. [1908] A.C. 295.

[*The parties' Intention may exclude the Ejusdem generis rule.*]

In July, 1907, a steamship belonging to Larsen was chartered by Sylvester & Co. to proceed to Grimsby and there load a cargo of coal. A clause in the charterparty ran thus: "The parties hereto mutually exempt each other from all liability arising from frosts, floods, strikes, lock-outs of workmen, disputes between masters and men, and any other unavoidable accidents or hindrances of what kind soever beyond their control, either preventing or delaying the working loading or shipping of the said cargo occurring on or after the date of this charter until actual completion of the loading."

The ship duly arrived at Grimsby, but, owing to the block of vessels in the harbour, was delayed in reaching the loading places, and consequently exceeded her loading time by 146 hours. Larsen having sued Sylvester & Co. for demurrage¹ in the county court, the learned judge gave judgment for the plaintiff for the amount claimed. The King's Bench Division (Phillimore and Walton, JJ.) reversed that decision and entered judgment for the defendants, and their decision was affirmed by the Court of Appeal (Vaughan Williams, Farwell, and Kennedy, L.JJ.). Hence this appeal.

LORD LOREBURN, L.C....Mr Hamilton argued that this hindrance was not within the words of the charter, and invoked the doctrine of *Ejusdem generis*. The language used is "any other unavoidable accidents or hindrances of what kind soever beyond their control." Those words follow certain particular specified hindrances which it is impossible to put into one and the same genus. In *Earl of Jersey v. Neath Poor Law Union* (22 Q.B.D. at p. 566), Fry, L.J., referred to words of a similar kind, and indicated that you have to regard the intention of the parties as expressed in their language; and that words such as these, hindrances "of what kind soever," are often intended to mean (as I am sure they are in this case intended to mean) exactly what they say. It is impossible to lay down any exhaustive rules for the application of the doctrine of *Ejusdem generis*, but I agree with Fry, L.J., that there may be great danger in loosely applying it. It may result, as he says, in "giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have."

LORD ASHBOURNE. The case has been argued with great force and insistence, and it has been stated that there are other cases looking to this one for decision.

A block for which neither of the parties was at all answerable took place in the harbour and prevented the ship from arriving at its proper place within the time at which otherwise it would have been quite able to arrive. It is alleged on behalf of the appellant that the block is not covered by the wide words used in the charterparty, "or hindrances of

¹ [EDITOR'S NOTE. *I.e.*, the detention (or compensation for the detention) of a vessel by the freighter beyond the time agreed on between him and the shipowner.]

what kind soever beyond their control." It is obvious that the more natural construction would be that they meant something operative; and were not meant to be dismissed by the phrase that they were only *ejusdem generis*.

I agree with my noble and learned friend upon the woolsack that the words of Fry, L.J., were wise and reasonable words. I can see no reason in fact or in common sense, or upon the construction of the document, why I should seek to find any special ground for excluding the block, that occurred, from the general words.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, I have fully appreciated the force of the argument which has been addressed to us on behalf of the appellant, an argument characterised not merely by ingenuity, but by great general soundness. I am bound to say that so far as I personally am concerned I should be well disposed to accede to that argument but for the words in the clause in question, "hindrances of what kind soever." I hope nothing will be deduced from our decision today which shakes the soundness of what is called the *Ejusdem generis* rule of construction; because it seems to me that, both in law and also as matter of literary criticism, it is perfectly sound.

The parties may well have realised the applicability of that rule to such contracts, and they insert these words, "of what kind soever," simply for the purpose of excluding that rule of construction. The effect of the insertion of these words is this: it excludes the limitation which would naturally arise from the context, and gives to the word "hindrance" its full meaning.

The remaining question is—Giving to the word "hindrance" its full latitude, is the occurrence in question within it? I think that may be solved by a very simple test. Supposing this vessel to have arrived at its further destination and to have been asked, "You are very late, what has hindered you?" the answer would have been, "The hindrance was a block in the harbour." Upon that simple ground I think the decision which your Lordships propose is entirely in accord with the net result of the clause. As I have said, I should be sorry if it were inferred from our decision that we detracted from the reasonableness and the authority of the principles of construction which are called *Ejusdem generis*.

LORD COLLINS. My Lords, I am of the same opinion.

[LORD LOREBURN, L.C. I agree with what Lord Robertson has said as regards the well-established rule of *Ejusdem generis*¹.]

Appeal dismissed.

[EDITOR'S NOTE. "The principle upon which the House of Lords proceeded in *Larsen v. Sylvester* was to make no change in the accepted rule [of *Ejusdem generis*], to cast no doubt upon either its utility or its application, but to recall that...this rule is subordinate to the intention of the parties and does not control it...The canon of construction is but the instrument for getting at the meaning of the parties; and the parties, if they use language intimating such intention, may exclude the operation of this (or, I suppose, any other) canon of construction." *Per* Hamilton, J. in *Thorman v. Dowgate S.C. Ltd.* (L.R. [1910] 1 K.B. at p. 419).]

¹ From the report in 13 *Commercial Cases*, at p. 333.

EASTERN COUNTIES RY. CO. v. MARRIAGE.

HOUSE OF LORDS. 1860.

9 H.L.C. 32.

[*Relative words are presumed, primâ facie, to refer to the nearest antecedent.*

But the context may rebut this presumption.]

[MARRIAGE, the plaintiff, was the owner of lands at Leigh, in Essex, through which the defendant Company had constructed a part of their railway line, thereby severing a dwelling-house from its garden. He claimed a mandamus to compel them, under the Lands Clauses Consolidation Act, 1845, to make accommodation-works to create a communication between the house and garden.

The Act contains a division headed: "And with respect to small portions of intersected land, be it enacted as follows." Then follows s. 93 which enacts that: "If any lands, *not being situate in a town*, shall be cut through and divided by the works in a specified manner, the owner shall have certain remedies." But s. 94 protects the promoters of the works, by providing that "If any *such* land shall be so cut through as to leave on either side of the works a piece of land...of less value than the expense of making...communication between the lands so divided," the promoters may require the owner to sell them this small piece of land. The defendants accordingly required the plaintiff to do so. At the trial the jury found that the premises severed *were* situated in a town. Martin, B., therefore directed a verdict for the plaintiff.

On a motion to enter the verdict for defendants, the Court of Exchequer was equally divided on the question whether the word "such," in s. 94, referred to "lands not being situate in a town" in s. 93, or to "small portions of intersected land" in the heading prefixed to those sections. On appeal to the Exchequer Chamber, the majority of that Court were in favour of the plaintiff. The defendants appealed.]

LORD WENSLEYDALE....Every one must agree that we ought to construe the 94th clause according to the ordinary grammatical rules; and further that, according to those rules, the word ["such"] must, *primâ facie*, be taken to apply to the last antecedent.

What, then, is the last antecedent? If these clauses were written together consecutively without breaks, and without a heading belonging to both, the next antecedent would be the words "such adjoining land." But as that would be insensible, the reference must be intended to be to the next antecedent which would make sense; and the words in the beginning of s. 93, "lands not situate in a town," would be the next antecedent.

But I am of opinion that an Act penned as this is cannot be read as a continuous enactment would be; various clauses relating to each separate subject are collected [in this Act] under various heads, with an appropriate heading to each class, which must apply to the whole of that class to which it is the heading. The meaning of this heading—"And with respect to small portions of intersected land, be it enacted"—is equivalent to saying that all the enactments...under that head relate

to "small portions of intersected land," and they must therefore be construed so to relate. The effect is the same...as if the heading had been repeated...at the head of each section....On this supposition, the "next antecedent" is to be considered as being "small portions of intersected land"; and the 94th section is to be taken to apply to lands so intersected, both in towns and not in towns....

Judgment reversed.

[EDITOR'S NOTE. In the Exchequer Chamber, Willes, J., thus laid down the general rule: "According to familiar rules of construction, the grammatical construction ["next antecedent"] should be adopted; unless it give rise to some manifest injustice, or incongruity with the other provisions"; (2 H. & N. 638). Thus, in an old case, a plaintiff brought an action, stating in his declaration a contract that "in consideration of the plaintiff's carrying certain meal from Reading to London the defendant *then and there* promised to pay him as much as he should deserve"; and got judgment in his favour from a local court at Reading. But on a writ of error the King's Bench held that the nearest antecedent to "there" was "London"; and that as the contract was thus stated to have been made in London, the Reading court had no jurisdiction; (2 Rolle Abr. 252).]

OWEN v. THOMAS.

CHANCERY. 1834.

3 MYLNE & K. 353.

[Certum est quod certum reddi potest.]

THE defendant, who was possessed of a leasehold house, entered into a parol agreement for the sale of it to the plaintiff at the price of a thousand guineas. As soon as the agreement was concluded, the plaintiff (by the direction of the defendant) wrote and sent by post to Mr Church, the defendant's solicitor, the following letter, to which the defendant, having previously read it over, affixed his signature.

"To Samuel Church, Esq., Brecon.

Aber, 7th February, 1828.

Dear Sir,

I have this day sold the house, etc., in Newport to Mr John Owen for 1000 guineas; and I am to receive the next half-year's rent. The money to be paid as soon as the deeds can be had from Mr Deere; and you will be pleased to lose no time in getting them from him.

I am, etc.,

Rowland Thomas."

The bill was filed by the purchaser against the vendor for a specific performance of this agreement. The defendant having died before putting in an answer, the suit was revived against his wife as personal representative. The wife, by her answer, set up a case of fraud and imposition on the part of the plaintiff but went into no evidence. The only evidence in support of the bill was the before-stated letter; which was admitted.

Pemberton, for the defendant....The language of the letter (assuming it to amount to an agreement within the Statute of Frauds) is far too vague in its terms for the Court to act upon. It neither specifies the subject of the sale, nor the quantity of interest to be conveyed....Besides,

there is nothing to shew that, before it was sent off, its contents were communicated to the plaintiff.

* * * * *

SIR JOHN LEACH, M.R. This letter...is a sufficient memorandum in writing of the agreement within the Statute of Frauds. It is true that the agreement must be certain in its terms; but *id certum est quod certum reddi potest*. It appears, upon the face of the agreement, that the house referred to is the house the deeds of which were in the possession of Deere; and the house might easily be ascertained before the Master. The defendant having, however, declined the inquiry, in effect admits that any uncertainty as to the subject of the agreement would be thereby removed; and the plaintiff is therefore entitled to the decree which he asks.

[EDITOR'S NOTE. Similarly it was said by Lord Ellenborough that "'A reasonable time' is as capable of being ascertained by evidence—and when ascertained is as fixed and certain—as if fixed by Act of Parliament"; (2 M. & S. 50).]

WEBB v. PLUMMER.

[*Expressio unius est exclusio alterius.*]

See this decision (as referred to in *Brown v. Byrne, supra*, p. 481); where it was held that if a lease specifies certain allowances to be paid by the incoming tenant to the outgoing tenant when the farm changes hands, all the other usual allowances that are not specified are excluded.

CROWLEY v. SWINDLES AND OTHERS.

COMMON PLEAS. 1672.

VAUGHAN 173.

[*Surplusagium non nocet.*]

[ACTION for unlawful distress by defendants as bailiffs of Mary Ashenhurst, widow. Plea that a former owner of the land where the distress was levied had granted a yearly rent of £20 thereout, to Edmund Ashenhurst and his wife the said Mary for their lives; to begin after the death of Anne Greaves or Thomas Greaves, whichever should first die; the first half-yearly payment to begin at the Lady Day or Michaelmas next following such death. The plea alleged the deed to have further provided "that if the rent were behind in part or in all, it should be lawful for the grantees and for the survivor of them to enter into the lands...and to distrain and detain until payment." It was added that Anne Greaves, Thomas Greaves, and Edmund Ashenhurst were all dead; and a year's rent being unpaid, the defendants had distrained for it under the widow's authority.

On production of the deed, the power of distress was found to be that, on non-payment, "it shall be lawful for the said Edmund and Mary, at any time during the joint natural lives of the said Anne Greaves and Thomas Greaves, if the said Edmund and Mary or either of them shall so long live...to enter into the grantor's lands...and to distrain."

The plaintiff objected that the clause as thus expressed in the deed differed from the clause alleged in the defendant's plea. The latter alleged a power to distrain for rent unpaid when due; which could not be until after the death of either Anne Greaves or Thomas Greaves, for the rent was not to commence until then. But the power of distress given by the deed only existed during the joint lives of those two persons.] So that the sense must run—that, if the rent were behind, it should be lawful to distrain during the joint lives of Anne and Thomas Greaves; which was before it could be behind. For it could not be behind till the death of one of them.

VAUGHAN, L.C.J. Therefore those words, “during their joint natural lives,” being insensible, ought to be rejected. For words (of known signification, but) so placed in the context of a deed that they make it repugnant and senseless, are to be rejected equally with words of no known signification.

Judgment for defendants.

[EDITOR'S NOTE. So in *Whittome v. Lamb*, where a lady who held property for only a chattel interest, made a lease of it, reserving rent payable to herself, “her heirs, executors, administrators, or assigns,” it was held that “the word *heirs* has [here] no meaning, and may be rejected as void and of no effect”; (12 M. & W. at p. 821). Cf. *Pordage v. Cole*, (*supra*, p. 399).]

MUNN v. BAKER AND ANOTHER.

NISI PRIUS. 1817.

2 STARKIE 255.

[*Verba accipiuntur fortius contra proferentem*¹.

E.g. Of simultaneous Notices take that least favourable to the giver.]

THIS was an action against the defendants for negligence as carriers, in losing a parcel.

It appeared that large printed notices had been stuck up in the defendants' counting-house and warehouse at the wharf, announcing that the proprietors would not be accountable for any article unless entered in the books by the book-keeper; who should give a receipt to the porter or other person entrusted with the delivery of the goods at the warehouse, which receipt should be deemed such a general acceptance of the goods as, in case of loss, should subject the proprietor to pay £5 if the goods weighed more than twenty-eight pounds, and, if less than twenty-eight pounds, twenty-five shillings, and not more. It was also proposed to prove that a similar notice of limitation had been published in the Gazette; but—

LORD ELLENBOROUGH, C.J., was of opinion that this evidence could not be received without proof of the plaintiff's having read the Gazette; since he might be expected to look into the Gazette for notices of the dissolution of partnerships, but not for notices by carriers as to the limitation of their responsibility.

¹ [EDITOR'S NOTE. “This, being a rule of some strictness and rigor, is the last to be resorted to; and is never to be relied upon but where all other rules of exposition fail”; (Blackstone, *Commentaries*, II. 380).]

It appeared that, when the goods were delivered, a small paper containing a notice without any such limitation as was contained in the large one, had been given to the person who delivered the parcel.

LORD ELLENBOROUGH was of opinion that by the delivery of a notice without the limitation the defendants had nullified the notice which contained the limitation. Having given two notices, they were bound by that which was least beneficial to themselves.

Verdict for plaintiff for the full amount.

[EDITOR'S NOTE. Alderson, B., thus stated this doctrine, in *Mayer v. Isaac* (6 M. & W. at p. 612): "Undoubtedly the generally received principle of law is, that the party who makes an instrument should take care so to express the amount of his own liability as that he may not be bound beyond what it was his intention that he should be. And, on the other hand, that the party who receives the instrument and parts with his goods on the faith of it, should rather have a construction put upon it in his favour; because the words of the instrument are not his but those of the other party." Cf. the dictum *per curiam* on p. 483 *supra*.

As a deed-poll is executed by one party only, its words are evidently his alone; whereas in an Indenture, it being made *inter partes*, a clause may emanate from either, or from both, of them. Hence in Indentures, as was said by an Elizabethan counsel, "The law will make such reference as is most fit and reasonable; and will say that the words are spoken by him who could most properly speak them"; (Plowd. 134). When the rule has to be applied to a Bond, the condition is regarded as an utterance of the person to whom the security is given; and consequently is construed in favour of the obligor, who gives the bond; (1 Wils. 61).

A notable exception to the rule occurs in bills of exchange and promissory notes; see p. 493 *infra*.]

BIRRELL AND OTHERS v. DRYER AND OTHERS.

HOUSE OF LORDS. 1884.

L.R. 9 APP. CA. 345.

[*The proferentem rule is inapplicable to words emanating from both parties.*]

APPEAL from the Second Division of the Court of Session, Scotland....

EARL OF SELBORNE, L.C. The question on this appeal is, whether the words "warranted no St Lawrence between the 1st of October and the 1st of April," in a time policy on the respondent's ship, *L. de V. Chipman*, effected with underwriters at Glasgow on the 8th of June, 1878 (for the twelve months from the 29th of May, 1878, to the 28th of May, 1879), include the Gulf of St Lawrence, or are confined to the river of that name?

Many witnesses were examined on both sides to shew in what sense they understood these words and thought that others ought to understand them. But none of those witnesses proved that they bore either the one sense or the other, according to any local or general usage; nor were they able to refer to any instances in which the question had practically arisen, and had been practically determined. Conflicting opinions of individuals, as to the proper interpretation of words in a written contract, would be entitled to no weight, even if it were clear that they were admissible.

Your Lordships have therefore to consider whether the ordinary rules and principles of construction do, or do not, enable you to ascertain the subject to which these words apply, having regard to those extrinsic

facts which are either within your judicial cognisance, or sufficiently established by the evidence....

Reading this contract of insurance in the light of the relevant facts, it appears to me that there are two subjects, distinguishable from but closely connected with each other, to both which the descriptive words "St Lawrence" may apply; and that there is nothing to confine them to one rather than the other of those subjects. The office of the negative form of expression "no St Lawrence," is not to define, but is to prohibit or exclude. It occurs in a contract for the purposes and objects of which it is reasonable and probable that both the gulf and the river should have been meant to be excluded. The reasons for such exclusion during the prohibited months [winter months of ice and of fog] are applicable to both, though in different degrees at different times during that period.

I do not think that the evidence discloses any ambiguity or uncertainty sufficient to prevent the application to this case of the ordinary rules and principles of construction. According to those rules and principles, the whole St Lawrence navigation, both of gulf and of river, is, in my judgment, within the fair and natural meaning of these negative words; and is therefore prohibited during the months in question. There does not appear to me to be any necessity for resorting to presumptions in favour of or against either party; whether founded on the rule *Fortius contra proferentem*, or on the onus of proving an exception from the general affirmative terms of this contract....

LORD BLACKBURN....Reliance was placed by some of the judges below on the maxim *Fortius contra proferentem*. I do not think the description of the district excluded can be considered as the words of one party more than the other. The shipowner, knowing where he is likely to employ his ship, and that he does not intend to use her in some district, generally puts on the slip a description of that district in order to induce the underwriters to agree to a lower premium.

I am by no means prepared to say that in some cases where the description of the excepted district is special, it may not be right to say that these are the words of the assured. But where the description is, like this, general, I think that the assured has a right to suppose that the underwriters understand that description as they ought to understand it. It is alike for the interest of assured and underwriters that the description should be definite; and that is attended to in the warranty¹ "no British America between the 1st of October and the 1st of April." No one could imagine that there was a material difference in the risk between a voyage from the most northern part in the United States, and one from the most southern part of British North America; or between a voyage commenced on the last day which is not prohibited, and one commenced on the first day which is prohibited. But a fixed limit is agreed on to prevent disputes.

I think that the Court should take judicial notice of the geographical position and the general names applied to such districts as this; in short,

¹ [EDITOR'S NOTE. This form of warranty had been proved to be frequently used in cases where it was desired to exclude the Gulf of St Lawrence (though couched in terms unnecessarily wide for that purpose).]

of all that we see on the Admiralty chart of this part of the sea. I do not know whether the first discoverers of America called the gulf that of St Lawrence, and then gave the same name to the river; or *vice versa*. Nor do I think it material. The name has for many years been applied to both. I think that, applying the name, as we find it used in charts and by geographers, to a well defined district, it includes both the river and the gulf.

LORD WATSON....Two at least of the three learned judges who formed the majority of the Second Division have held that "no St Lawrence" must be applied to the river only, on the ground that the expression is ambiguous; and that the ambiguity must be solved adversely to the appellants, because "the underwriters are the *proferentes* with regard to a policy of insurance." That the underwriters may be rightly held to be the *proferentes* with regard to many conditions in a policy I do not doubt; whether they ought to be so held depends, in each case, upon the character and substance of the condition. In the present case there are many considerations which lead to the inference that the clause in question is not one constructed and inserted by the appellants alone, and for their own protection merely. It was, in point of fact, inserted in the contract by the agent of the respondents; and it is in form a warranty by them that their vessel will not be navigated in certain waters, a matter which it was entirely within their power to regulate. These considerations point rather to the respondents themselves being the *proferentes*. But I think the substance of the warranty must be looked to; and that, in substance, its authorship is attributable to both parties alike. The main object of the clause is to define the limits within which the vessel is to be kept whilst she is navigated under the policy; and that appears to me to be as much the concern of the shipowner as of the underwriters. To define the limits within which the vessel is to be navigated, for the purposes of a time policy, is, in principle, precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy. In both cases it is a definition of the subject matter of the insurance; a term the settlement of which must, in my opinion, be regarded, in a case like the present, as the deliberate act of both parties.

Although the rule of construction *contra proferentem* may not apply, I think it was rightly argued for the respondents that, seeing the clause in question occurs in the shape of an exception from a leading term of the policy which gives the vessel leave to navigate in any waters, it can only receive effect in so far as it is plain and unambiguous. But I am not satisfied that there is any ambiguity, such as will avail the respondents, to be found in the clause when it is read as a whole. The ambiguity, according to the argument of the respondents, consists in this, that the words may denote either the river, or both gulf and river; and, according to the view taken by Lord Young, consists in their being applicable either to the river, or to the gulf, or to both. It is not matter of dispute that the name "St Lawrence" is applicable to the gulf and also to the river; and that, as suggested by Lord Young, it is equally correct to designate the gulf and river as the gulf and river of St Lawrence. And if one could conceive a case of the words "St Lawrence" standing by

themselves in a policy, without any qualifying context, they certainly would be ambiguous, if not unintelligible. But in the present case any ambiguity which might otherwise have arisen is expelled by the word "no." It is a universal negative; and, in my opinion, excludes all navigable waters, salt or fresh, bearing the name of St Lawrence, which can reasonably be held to have been within the contemplation of the parties to the policy. If the river had been the only navigable water in North America known as St Lawrence, and there had been elsewhere a gulf of that name, I might have hesitated to hold that the latter was within their contemplation. But the gulf and river of St Lawrence are so intimately connected, and the perils attendant upon their winter navigation so much akin, that I have come to the conclusion that the warranty must be held to exclude both.

Appeal allowed.

SAUNDERSON AND OTHERS v. PIPER AND OTHERS.

COMMON PLEAS. 1839.

5 BINGHAM, N.C. 425.

[Bills and notes may involve an exception to the rule.]

[THE plaintiffs, as indorsees, declared against the defendants as acceptors of a bill of exchange for £245 for value received; bearing date August 30, 1836, and payable six months after date. The bill was expressed in the *figures* at its head to be drawn for "£245"; but in the *words*, for "two hundred pounds."

At the trial it was proved that the bill was drawn by Maltby and Co. in payment of the sum of £245; being the contract price of ten tons of lead sold by them to the defendants. The bill was drawn in figures for £245, though the words "and forty-five" were omitted in the body of the bill by mistake. The bill, when drawn was upon a stamp applicable to the higher amount; and the defendants, when they accepted it, intended to accept a bill for £245....The defendants objected to the admissibility of evidence of (1) the facts relating to the transaction in respect of which the bill was drawn, (2) the intention of the parties, (3) of the applications for the defendants' acceptance. But the evidence was received, subject to the opinion of the Court. The jury found a verdict for the plaintiffs for £245 and interest.]

Wilde, Serjt., for the plaintiffs. The amount of the stamp, the value of the goods for which the bill was accepted, and the conduct of the acceptors, shew clearly that it was their intention to accept a bill for £245. The bill being drawn for value received, the plaintiffs only explain the instrument, and do not contradict or vary it, by shewing what the amount of that value was....In *Gibson v. Minet* (1 H. Bl. 569), where a bill was made payable to a *fictional* payee "or order," and the defendants sought to avail themselves of their own fraud, evidence was admitted which enabled the indorsee to recover as on a bill payable to bearer....The rule of *Fortius contra proferentem* would have no applicability at all, if it were not applicable to a case like the present.

TINDAL, C.J....This is a case of *ambiguitas patens*; and, according to the rules of law, evidence to explain such an ambiguity is not admissible. Where there is doubt on the face of the instrument the law admits no extrinsic evidence to explain it. Now, on the body of the bill in question, it appears to have been drawn for two hundred pounds; but in the margin, the figures express the sum of £245. If this creates any ambiguity, it is one which arises on the face of the instrument. In *Gibson v. Minet* parol evidence (not the language of the instrument) introduced the difficulty; and parol evidence was admitted to remove it....

The evidence in question not being admissible, we cannot shake the rule of commercial writers that where a difference appears between the figures and the words of the bill, it is safer to attend to the words. If we take the authority of those writers where we have none of our own, this is a good bill for the sum expressed in the body.

BOSANQUET, J....The argument that pressed me most, is the rule of *Fortius contra proferentem*; an instrument must be taken most strongly against the party making it. But there is no case in which that principle has been applied to an instrument the body of which expresses a clear amount, and the ambiguity arises from a different amount expressed in the margin. Under such circumstances the rule of law as to evidence must prevail.

Judgment for £200 only.

[EDITOR'S NOTE. The legislature has now expressly enacted by s. 9 (2) of the Bills of Exchange Act, 1882, that, where the sum payable on a bill of exchange or promissory note "is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable," even though it be the lesser of the two.]

COLES v. HULME.

WILSON v. WILSON.

[*Erroros scribentis nocere non debent. Mere clerical errors do not vitiate.*]

SEE these two cases as referred to at p. 452 and p. 455 *n. supra*.

IN RE VINCE. EX PARTE BAXTER.

COURT OF APPEAL. 1892.

L.R. [1892] 2 Q.B. 478.

[*The words of a contract may be so incapable of interpretation as to be void for uncertainty.*]

[JOHN VINCE, a corn-merchant, borrowed from Dudley Baxter £4500. He gave a written agreement to pay interest for it by half-yearly payments of £462. 10s.; with a clause providing that if he should be unable to pay any portion of the interest "by reason of the deficiency of the profits of John Vince, then, and upon every such occasion, a due allowance shall be made by Dudley Baxter to John Vince in respect of the same in a fair and reasonable manner."

In 1891 Vince became bankrupt; and Baxter tendered a proof in the bankruptcy for the balance then due under the agreement. The trustee held that the loan fell within the Partnership Law Amendment Act, 1865 (28 & 29 Vic. c. 86, ss. 1 and 5)¹ as being a loan to a person engaged in business on a written contract for a rate of interest varying with the profits. He therefore rejected the proof except for the purpose of ranking for a dividend after all the other creditors had been paid in full. The county court judge, however, held the clause for allowance to be mere surplusage [cf. p. 488 *supra*]; and ordered the proof to rank with other creditors. The trustee appealed; and a Divisional Court reversed the judge's decision. Baxter appealed.]

THE COURT allowed the appeal, on the ground that the agreement was expressed in such vague and uncertain terms that it was impossible to say in what mode the "due allowance" in diminution of the interest was to be ascertained....It could not therefore be said that the rate of interest varied with the profits, or that the Act applied. The agreement, being unintelligible, must be treated as void. The appellant was entitled to prove for the unpaid balance of the loan simply as for money lent.

[EDITOR'S NOTE. In *Guthing v. Lynn* (2 B. & Ad. 232), on the sale of a horse, the agreement contained a promise by the purchaser "If the horse is *lucky to me*, to give £5 more or *the buying of another horse*." Lord Tenterden pronounced the promise to be "much too loose and vague to be considered in a court of law. Who is to say under what circumstances a horse shall be said to have proved 'lucky'?" And, as was added by Littledale, J., "'The buying of another horse' is a term to which we cannot assign any definite meaning." Cf. p. 511 *infra*.]

¹ [EDITOR'S NOTE. These sections are now replaced by the Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 2, 3.]

CHAPTER XI

THE ASSIGNMENT OF CONTRACTS

THE KING *v.* TWINE AND OTHERS.

COURT OF EXCHEQUER. 1605.

CROKE JAC. 179.

[Common Law forbade assignment, by private persons, of contracts or other choses in action.]

[UPON demurrer.

All the goods and debts of a deceased outlaw, George York, had been forfeited to the Crown. Queen Elizabeth granted them to Francis Anger. York had recovered £4000 damages in an action against John Allen. This judgment-debt Anger assigned by deed to Christopher Twine. Subsequently a writ of execution was issued in the name of King James I, on behalf of Anger, against all the lands which Allen had at the date of the judgment. Thomas Twine, who had purchased some of these after the judgment, pleaded to be discharged from this execution; on the ground that the debt now belonged not to the Crown, but to Christopher Twine, as assignee from the Crown.]

ALL THE BARONS resolved that, as the King's Grant of a "thing in action" is good enough, so this debt, which is forfeited to the King by the outlawry of York, is well granted. And the grantee may have the benefit to levy this debt by action in his own name or in the King's name.... But the assignment over of this debt by Anger to Christopher Twine is merely void; *for there cannot by law be any assignment made by a common person of this debt.* It was therefore adjudged that the plea *was ill and no cause of discharge*....

[EDITOR'S NOTE. Lord Coke explains this prohibition to transfer the benefit of a contract as having been intended "to check maintenance and stirring up of suits"; for otherwise "Pretended titles might be granted to great men; whereby right might be trodden down, and the weak oppressed, which the Common Law forbiddeth"; (Co. Litt. 214 a).]

The prohibition did not prevent the substitution of a new creditor by a Novation—as distinct from a mere Assignment—of the contract. *A, B* and *C* may agree that a definite ascertained debt, due to *A* from *B*, shall be paid to *A* by *C*, and that *A* shall take *C* as his debtor and give up all claim against *B*. This new contract, to which *the debtor himself* is a party, constitutes an Accord and Satisfaction, extinguishing the original debt; and this extinguishment is consideration for the debtor's new promise. Cf. the cases given under "Discharge by New Agreement," *supra*.

Moreover, the prohibition itself could in practice be evaded by the assignor's giving to the assignee—as Twine's Case shews to have been done in certain assignments by the Crown—an authority to sue the debtor in the name of the assignor.]

RAW v. DAWSON.

CHANCERY. 1749.

1 VESEY SEN. 332.

[But Equity permitted contracts to be assigned.]

TONSON AND CONWAY lent money to Gibson, who made a draught on Swinburn, the deputy of Horace Walpole, viz. "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson and Conway, value received."

Gibson became bankrupt. The question was, whether the defendants Tonson and the executors of Conway were first entitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs (the assignees under the commission) are entitled to have the whole sum paid to them. [It was urged for the plaintiffs] that this draught was in nature of a bill of exchange; and that the property was not divested out of the bankrupt at the time of the bankruptcy in law or equity.

LORD HARDWICKE, L.C....This demand, the instrument under which the defendants claim, is not a bill of exchange, but a draught; not to pay generally, but out of his particular fund; which creates no personal demand. Therefore not a draught on personal credit to go in the common course of negotiation (which is necessary to bills of exchange) by draught on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. The first case of which kind I remember to have been determined in the King's Bench not to be a bill of exchange, was a draught by an officer on the agent of his regiment to be paid out of his growing subsistence.

Then what is it? For it must amount to something. It is an agreement, for valuable consideration before hand, to lend money on the faith of being satisfied out of this fund; which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt. And, though the law does not admit an assignment of a chose in action, this court does. And any words will do; no particular words being necessary thereto. In the case of a bond it may be assigned in equity for valuable consideration; and good, although no special form used. Suppose an obligee receives the money on the bond; and there is wrote on the back of it: "Whereas I have received the principal and interest from such a one, do you (the obligor) pay the money to him." This is just that case; only it is not a debt arising from specialty; therefore like an assignment of rent by direction to a tenant or steward to pay so much of a year's rent to a third person....This draught, which amounts to an assignment, is deposited with the officer Swinburn, and therefore it attached immediately upon it: so that Swinburn could not have paid this money to Gibson, (supposing he had not been bankrupt) without making himself liable to the defendants. Because he would have paid it with full notice of this assignment for valuable consideration.

WM. BRANDT'S SONS & CO. v. DUNLOP RUBBER CO. LD.

HOUSE OF LORDS. 1905.

L.R. [1905] A.C. 454.

[The Judicature Act now permits the assignment of contracts at law also¹.]

[KAMRISCH AND Co., rubber merchants at Liverpool, sold to the Dunlop Rubber Company a parcel of rubber; which they had bought by help of an advance of £3430 from the plaintiffs. To the plaintiffs was given by Kamrisch & Co. a written undertaking that the price should be paid direct to them and that they should meanwhile have a "sole and absolute lien on the goods." With the goods Kamrisch & Co. sent to Dunlops a written request to remit the price to the plaintiffs.

They also sent to Brandts a letter addressed to them but intended to be signed by Dunlops, and also a written request to Dunlops to sign it and send it to Brandts. The former document was a promise to remit to Brandts, subject to approval of goods, "the amount of invoice, £369. 2s. 10d. and £3263. 4s. 2d., (for packages of raw rubber received today from Messrs Kamrisch & Co., Liverpool), when due, direct to your good selves for account of Messrs Kamrisch & Co." Brandts sent these documents to Dunlops, and confirmed the request for signature. The promise was signed by an employé of Dunlops, and was then returned by him to Brandts; but he had no authority to sign it, and he did not inform his employers. They accordingly, instead of sending their cheque to Brandts, sent it to another Bank, to which (under a standing order from Kamrisch & Co.) they were accustomed to remit the price of rubber. On Brandts pressing Dunlops for the money, they replied that they had paid it. Brandts therefore brought the present action. Walton, J. gave judgment for them; but the Court of Appeal reversed it (L.R. [1904] 1 K.B. 387). Brandts appealed. The arguments of counsel have not been reported.]

EARL OF HALSBURY, L.C....Before the statute² there was a conflict [between Law and Equity] as regards assignments of debts and other choses in action. At law it was considered necessary that the debtor should enter into some engagement with the assignee. That was never the

¹ [EDITOR'S NOTE. But of none that were not already assignable in Equity; and not of some that were so assignable.]

² [EDITOR'S NOTE. The Judicature Act, 1873, (36 & 37 Vict. c. 66) by s. 25, sub-s. 6, provides that: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

The notice to the debtor must be "in writing," even though he be unable to read, and though the assignment has been read aloud to him; *Hockley v. Goldstein*, 25 Com. Ca. 284.])

rule in equity. It "is certainly not the doctrine of this Court," said Lord Eldon, sitting in Chancery in *Ex parte South* (3 Swans. 392). In certain cases the Judicature Act places the assignee in a better position than he was before....Whether the present case falls within the favoured class may perhaps be doubted. At any rate, it is wholly immaterial for the plaintiffs' success in this action. But, says the Lord Chief Justice, "the document does not, on the face of it, purport to be an assignment nor use the language of an assignment." An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor. I think that the documents which passed between Brandts and the company would of themselves (and apart from Kamrisch & Co.'s undertaking and engagement given to Brandts) have constituted a good equitable assignment. But the real question is, were they notice to the company that Brandts were interested in the money. As between Kamrisch & Co. and Brandts the assignment was already perfect without them....

It is difficult to conceive a plainer case of an equitable assignment, or a clearer case of notice to the debtor....The Dunlops receive through Brandts a notice which no man of business could mistake, telling them, on Kamrisch & Co.'s express authority, that they are to pay to Brandts the money which they owe their creditors, Kamrisch & Co. What more could be required? Dunlops disregard that notice; and pay the wrong people. They must pay the money over again, and pay it to the right people.

LORD JAMES....The loss ought to fall on the defendants. The person authorised by them to deal with their correspondence...neglected his duty when he omitted to seek specific orders from London....But the neglect was that of the defendants' agent; and it is more reasonable that the result should be borne by his employers than by those...who could know nothing of the omission.

Appeal allowed.

[EDITOR'S NOTE. There being thus an assignment valid in Equity, it was unnecessary to decide as to the correctness of the view taken by the Court of Appeal, that the language used in the documents amounted only to an Authority to pay to Brandts, and not to that "absolute" assignment which would satisfy the Judicature Act.]

TORKINGTON v. MAGEE.

KING'S BENCH DIVISION. 1902.

L.R. [1902] 2 K.B. 427.

[Thus a contract for the sale of property is so assignable.]

[THE defendant had contracted with a Mr Rayner to sell to him for £1875 the defendant's reversionary interest in a sum of £6000 charged on certain

stocks and funds. Rayner assigned to the plaintiff by a deed his interest in this contract. Written notice of the assignment was given to Magee. At the date of the assignment there had been no breach of the contract. But after some subsequent negotiations, the plaintiff considered that Magee had broken the contract; and the present action was accordingly brought to recover damages. It was held that the contract had been broken, and that the damages (if the plaintiff were entitled to sue) would be £100, but that the Judicature Act did not entitle the plaintiff to sue in his own name. The plaintiff appealed.]

Macnaghten, for defendant....The words of the Judicature Act, "debt or other legal chose in action" mean "debt or other liquidated money claim arising under a contract." They do not include a right to claim unliquidated damages; *May v. Lane* (64 L. J. R., Q.B. 236)....

Further, this was not a right which could have been assigned before the Judicature Act....A bare right to sue was not assignable; nor would the Court of Equity ever enforce its assignment; *Prosser v. Edmonds* (1 Y. & C. 481).

CHANNELL, J...."Chose in action" is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is an expression large enough to include rights which it can hardly have been intended should be assignable by virtue of the sub-section in question, as, for instance, shares, which can only be transferred as provided by the Companies Acts. It is therefore probably necessary to put some limit on the words....I think the words "debt or other legal chose in action" mean "debt or right which the Common Law looks on as not assignable by reason of its being a chose in action, but which a Court of Equity deals with as being assignable." That is the point of difference or variance between the rules of equity and common law which it is intended to deal with by this sub-section....I believe it to be clear that in such a case as the present, if the assignor Rayner refused to sue the defendant for damages for the benefit of the present plaintiff (the assignee), the plaintiff could have taken proceedings in a Court of Equity, and have got a decree that he should be at liberty (on giving a proper indemnity) to use the assignor's name for the purpose of suing the present defendant....

I have no doubt that the practice of the Court of Equity prior to the Judicature Act was to refuse to give effect to an assignment of a mere right to litigate¹. Those Courts were bound by the law as to champerty and maintenance as well as were the Courts of Common Law. It is not, however, necessary for us to deal exhaustively with the question of what contracts a Court of Equity would have held to be assignable. Here the contract is one to purchase a reversion. It is a class of contract in which the Court of Equity recognised the right of each party, vendor

¹ [EDITOR'S NOTE. Hence such a cause of action cannot be assigned under the Act. But the right to the damages that may be recovered in a litigation to be conducted by the assignor himself (even for a Tort) are capable of assignment, as representing an implied contract to assign "when the matter shall have fructified"; *Glegg v. Bromley* (105 L.T. 897).]

as well as purchaser, to specific performance; and where the purchaser was entitled to specific performance he was recognised as having an equitable interest in the property. In that state of things he could assign the contract and his equitable interest thereunder without any objection arising from the law as to champerty. The fact that something subsequently happened which prevented his getting specific performance, or the fact that he elected to claim damages, would not take away the right which had vested in him, on notice of the assignment, to all the legal and other remedies for the chose in action....The Chief Justice and Mr Justice Darling concur in this judgment.

Appeal allowed.

[EDITOR'S NOTE. Similarly, under a hire-purchase agreement, the hirer's option to buy the article is a right assignable under the Act; *Whiteley v. Hill* (L.R. [1918] 2 K.B. 808).]

JONES v. HUMPHREYS.

KING'S BENCH DIVISION. 1901.

L.R. [1902] 1 K.B. 10.

[But a debt of indefinite amount is not assignable thus.]

[THE plaintiff was a money-lender. In May, 1900, he advanced to James Kerr, an assistant teacher in a school kept by the defendant, a sum of £15. Kerr, in return, signed a document by which he made over to the plaintiff "so much and such part of my income, salary, and other emoluments from Leonard Humphreys...or from any other person whose employ I may hereafter enter, or from any other source whatsoever, to which I am or may hereafter become entitled, as shall be necessary and requisite for payment to you of the sum of £22. 10s., or of any further or other sums in which I may at any time hereafter become indebted to you." In October the plaintiff gave the defendant notice of this assignment; and claimed Kerr's salary. The defendant disregarded the notice; and went on paying to Kerr himself. The plaintiff brought the present action in the County Court. The judge held that the assignment, not being of a definite and ascertained amount, was not within the Judicature Act, and that Jones could not therefore sue in his own name against Humphreys. The plaintiff appealed.]

Bray, K.C., for plaintiff....An assignment of future debts may be good. Probably it is good even though the source from which those debts may become payable is left undefined; (*Tailby v. Official Receiver* (L.R., 13 A.C. 523)). But even if it be a bad equitable assignment in so far as it refers to the income derivable from "any other source whatsoever," the good part of the assignment is separable from the bad; *Coombe v. Carter*; (L.R. 36 Ch. D. 348).

The plaintiff is entitled to sue in his own name under the Judicature Act....To the extent of £22. 10s. the assignment is definite in amount; and the subject-matter is divisible, and the good part may be severed from the bad.

* * * * *

LORD ALVERSTONE, C.J. An absolute assignment of future debts may be a good assignment for the purposes [of s. 25 of the Judicature Act]....But I think that an assignment of an undefined portion of future debts will not come within it. To satisfy the section, you must be able to find in the document an intention to assign some definite sum; so that the debtor may know how much he is justified in paying to the assignee. It was contended that to the extent of £22. 10s. of the salary, the document did purport to assign a definite sum. But I am of opinion that that is not so....I think it contemplates that the £22. 10s. may not only be increased by further borrowing, but may also be reduced by payment....That being so, the document is not an absolute assignment of any definite sum; but is a mere security, purporting to be by way of charge.

Whether, if the amount...had been defined, the fact that the document assigned only a portion of the salary...and not the whole of it, was sufficient to prevent its being an "absolute assignment," within the meaning of the section, I express no opinion.

Appeal dismissed.

[EDITOR'S NOTE. On the question, left undecided in this case, as to whether an assignment of a *definite* part of a debt can take effect under the Judicature Act, conflicting dicta have been pronounced. But the preponderant opinion seems to be that it is *not* within the Act. "If the debt were split up by three or four assignments, there might be three or four actions, and three or four executions;...unnecessary burdens upon the debtor"; see *Foster v. Baker* (L.R. [1910] 2 K.B. 636). Cf. p. 507 *infra*.]

IN RE WESTERTON.

PUBLIC TRUSTEE v. GRAY.

CHANCERY DIVISION. 1919.

L.R., [1919] 2 Ch. 104.

[These statutory assignments do not require a Consideration.]

[WESTERTON lodged in the house of Mrs Gray, who nursed him with much kindness. On one occasion he handed her as "a present for you" an envelope, the contents of which were worth (he said) £500. She returned it to him, to "keep it for me." On his death, a year later, his daughter found in his locked despatch-box this envelope. It contained three papers. One was a deposit-receipt of the London County and Westminster Bank for £500; on its margin were printed the words "Not transferable." Another was an order to that Bank to "pay to Mrs Clara Gray or order the sum of £500 now on deposit at your Bank, as per receipt No. 1768, dated 6 January, 1914. H. G. WESTERTON." The third was a letter: "Dear Mrs Gray: You have been very kind to me; and I desire to make some return by giving you the amount of £500, now on deposit at the L.C.W. Bank, as per receipt enclosed. Yours gratefully, H. G. WESTERTON." The back of the deposit note bore a form of receipt; but Westerton had not signed it. The Bank paid the sum to the Public Trustee, as Westerton's executor, on being indemnified by him. An originating summons was taken out to determine Mrs Gray's claim.]

Paterson, for the residuary legatees....I do not dispute, that notice may be given at any time before action is brought; but here notice was essential to complete the assignment. The mere delivery of the deposit receipt was not sufficient to effect an assignment....The testator omitted to sign the indorsed receipt. It was an imperfect voluntary assignment; which equity will not assist; *Edwards v. Jones* (1 My. & Cr. 226)....An "absolute assignment" within the Judicature Act means an effective assignment, by which the property is divested entirely out of the assignor.

Moreover the facts shew that the testator did not mean the gift to take effect until his death, and intended it to be in the nature of a testamentary disposition.

SARGANT, J....The letter, according to the construction which I place upon it, amounted to an out-and-out gift, and not an expression of a mere desire to make a gift. The direction to the Bank...seems to me a direct order to the Bank, operating by way of transfer to Mrs Gray of the testator's right. I do not think there was anything future or contingent about it....There was not any re-transfer or repudiation of the gift by her [but a mere return of the documents for safe custody]....As the deposit receipt was clearly identified in the letter to the Bank, that direction to pay is just as good as if the direction had been endorsed on the deposit receipt itself....[The presence of a particular form of receipt on the back] was not in any way a condition as to the terms on which the money might be required by the depositor....The omission to give notice in no way affected the efficacy of the assignment as between the donor and the donee; though, if the Bank, having had no notice, had paid [principal or interest] to the testator, it would have been a good payment as against the donee....

But, apart from the Judicature Act, 1873, the want of consideration would have been fatal to Mrs Gray's claim....The effect of s. 25, subs. 6, of the Judicature Act, 1873, has been to improve the position of the assignee of a chose in action who satisfies the words of the sub-section... by enabling him to dispense at law with the use of the name of the assignor and so to dispense with the circuitous process of compelling the assignor in equity to allow his name to be used in proceedings by the assignee. The result of the sub-section is that an assignee, who takes under such an absolute assignment as is there mentioned, can now sue at law in his own name....

If by means of the simplification of procedure the assignee has been relieved from taking preliminary proceedings in equity, there seems to me to be nothing very startling in the further conclusion, that the assignee has also been relieved from the terms which equity imposed as a condition of assisting him in obtaining the legal right, if at law the question of consideration was regarded as wholly immaterial. I think that it must have been so regarded; for this reason, that at law the action was brought in the name of the assignor, so that there was no question at all of any transaction between the assignor and the assignee under which the question of consideration could arise. If that be so and if since the Judicature Act, 1873, the assignee can come directly in his own name

and sue as effectually as he could have done in the name of the assignor, it appears to me that there is no reason for continuing against the assignee those terms which were imposed by equity as a condition of granting relief. The position of the assignee has in this respect been improved once, and for all, by the Judicature Act, which has conferred on him a legal right to sue. In my judgment I ought not to consider that legal right as being in any way dependent upon the question whether the assignment was made for valuable consideration or not; provided it complies with the express conditions of that sub-section. [He pointed out that in *In re Willidms* (L.R. [1917] 1 Ch. 1) the Court of Appeal, in dealing with a voluntary assignment, had pronounced it bad as being conditional and future, but had disregarded the absence of consideration.]

In my judgment, Mrs Gray is entitled to the sum of £500 in question with interest from the date of the death of the testator.

[EDITOR'S NOTE. Mrs Gray made no claim to the interest that had been credited to the testator's current account in his lifetime.]

BENNETT v. WHITE.

COURT OF APPEAL. 1910.

L.R. [1910] 2 K.B. 643.

[*A debt thus assigned may be set off by assignee against a debt due from him to that debtor.*]

[THE plaintiff owed £31 to a Mr Burton. The latter, by deed, assigned this debt to White; and gave written notice of the deed to the plaintiff.

The present action was brought to recover the cost of work done and materials provided by the plaintiff for the defendant. The defendant admitted his liability; but claimed to set off the above-mentioned £31.

Judgment was given for plaintiff; it being held that the right of set-off was limited to the case of a defendant and plaintiff who had contracted with each other directly. The defendant appealed.]

Harvey, for respondent....The proper way for the defendant to obtain credit for this debt was to set it up by way of counter-claim....

COZENS-HARDY, M.R....When once an assignment of a debt is made in writing and notice is given to the debtor, the assignee has a legal right of action against the debtor to the same extent as the assignor had. The debtor is protected by the express provision that the assignment is to be "subject to all equities." The assignee has a full and absolute right to say that the debt is his debt for all purposes; including the purposes of the Statute of Set-off. The debt is for all purposes in the same position as if it had been the original debt of the assignee....What was said by Lord Esher in *Read v. Brown* (L.R., 22 Q.B.D. 128) is conclusive;... "The debt is transferred to the assignee and becomes as though it had been his from the beginning. It is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him."

Appeal allowed.

DURHAM BROTHERS v. ROBERTSON.

COURT OF APPEAL. 1898.

L.R. [1898] 1 Q.B. 765.

[Even a mortgage is sufficiently "absolute" to be within the Act.]

[ON April 1, 1895, the defendant entered into a building contract with contractors, Smith & Co.; under which it was stipulated that the contractors should build certain houses, which were to be leased to them at a ground-rent of £150. One of the clauses of the contract gave the contractors the option of paying an additional ground-rent of £60, in consideration of which they were to receive from the defendant a sum of £1080. On August 19, 1895, the contractors wrote to the plaintiffs in the following terms: "*Re Building Contract of Middle-class Dwellings situate on the west side of South Lambeth Road. In consideration of money advanced from time to time we hereby charge the sum of £1080, being the agreed price for the sale of £60 per annum ground-rent, (which will become due to us from John Robertson, Esq., of No. 73, Rosendale Road, West Dulwich, on the completion of the above buildings) as security for the advances....And we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you.*" The plaintiffs gave notice of the assignment to the defendant (the John Robertson named therein). This action was brought against him to recover the amount which it was alleged had, in the events that happened, become due. It was contended by defendant that, as the Judicature Act applies only to assignments that are "absolute," mortgages are not included, for they are defeasible by redemption. Judgment was given for plaintiff.]

Marshall, Q.C., for defendant. The Judicature Act gives a right of action to the assignee on "an absolute assignment (not purporting to be by way of charge only)." The document on which the plaintiffs rely is not such an assignment; it purports to be a "charge." And though the expression "assign" is used, that is qualified by the words that follow it. To bring a case within the section there must be either an express power to give a receipt for the money, or an order to pay directly to the person named (which would empower him to give a receipt), or an actual assignment by way of mortgage which gives the right to the mortgagee to sue in his own name. This document does not shew that the plaintiffs can give a legal discharge for the debt.

Further, there was neither a debt nor an existing chose in action; for the contractors had an option whether they would pay the improved ground-rent, and so were not bound to carry out the arrangement which would entitle them to the £1080.

* * * * *

CHITTY, L.J....It is requisite that the assignment should be, or at all events purport to be, "absolute"; and it will not suffice if the assignment "purport to be by way of charge only." It is plain that not every equitable assignment (in the wide sense of the term as used in equity) is within the enactment. The question has arisen whether a mortgage,

(in the proper sense of the term and as now generally understood), is within the enactment. In *Tancred v. Delagoa Bay and East Africa Railway* (L.R., 23 Q.B.D. 322) there was an assignment of a debt, to secure advances; with a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court, disapproving of a decision in *National Provincial Bank v. Harle* (L.R., 6 Q.B.D. 626), that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was "absolute"; for it purported to pass the entire interest of the assignor in the debt to the mortgagee; and it was not an assignment purporting to be by way of charge only¹. The mortgagor-assignor had a right to redeem; and, on repayment of the advances, a right to have the assigned debt reassigned to him. Notice of that reassignment would (pursuant to the sub-section) be given to the original debtor; and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for reassignment. Where there is an absolute assignment of the debt but by way of security, equity would imply a right to a reassignment on redemption; and the sub-section would apply to the case of such an absolute assignment....

The assignment before us complies with all the terms of the enactment, save one which is essential. It is not an absolute but a conditional assignment; ["until the money be repaid"]. (The commonest and most familiar instance of a conditional assurance is an assurance "*until* J. S. shall return from Rome.") The repayment of the money advanced is an uncertain event, and makes the assignment conditional. Where the Act applies, it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee.... It appears to me, as at present advised, to be questionable whether an assignment of part of an entire debt is within the Act. If it be, it would leave it in the power [cf. p. 503 n.] of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit.... The plaintiff's assignment is not within the Act, and they had no legal right to sue for it. The assignment, however, is a valid equitable assignment, but by way of security only, and without power to give a valid discharge to the debtor. No relief can be given to the plaintiffs in this action as it is constituted.

Appeal allowed.

KEMP AND OTHERS v. BAERSELMAN.

COURT OF APPEAL. 1906.

L.R. [1906] 2 K.B. 604.

[*A contract creating a personal relation cannot be assigned.*]

[THE plaintiff, George H. Kemp, was, previously to the assignment hereinafter mentioned, a cake manufacturer; carrying on business at two places in London (Annette Road, Holloway, and Martineau Road),

¹ [EDITOR'S NOTE. A mere "charge" gives a right to be paid out of a particular source; but does not transfer that source.]

and having a depôt at Cardiff. The defendant was a provision merchant. By an agreement dated March 24, 1904, made between Kemp and the defendant, it was agreed as follows:

1. "Baerselman agrees to supply, and Kemp agrees to accept, all the fresh shell eggs (Star Wreaths or equal to Star Wreaths) that he shall require for manufacturing purposes for one year from April 1, 1904 to April 1, 1905," at certain specified prices.

3. "The said Baerselman agrees to deliver all shell eggs...to either of Kemp's London factories free of charge; and all goods for Kemp's Cardiff depôt free on rail or boat."

4. "Every 14 days a statement of account is to be rendered; and after being checked and found correct, Baerselman to draw for the amount at two months from date of delivery."

5. "During the continuance of this agreement, or so long as the said Baerselman shall continue to supply sound fresh eggs satisfactorily to the said Kemp, the said Kemp undertakes not to purchase eggs from any other merchant."

Later in 1904 Kemp purchased an additional business (in Brewery Road, London), and then transferred both businesses (abandoning Martineau Road) to a new company called "George Kemp, Limited," of which he was manager and almost sole owner. Baerselman thereupon declared the agreement to be at an end, and refused to supply any more eggs. An action for non-delivery was brought by Kemp and by his company, as co-plaintiffs. Channell, J., held that the agreement did not cover Brewery Road; but that the benefit of it, as regards the original businesses, was assignable and had passed to the plaintiff company though liability¹ to pay for the eggs remained on Kemp himself. He gave judgment for plaintiffs. Both parties appealed.]

Hamilton, K.C., for the plaintiffs....The only effect of the amalgamation is that Kemp has enlarged his business. The business is still his.

Even assuming the Company to be a person distinct from him, the benefit of a mercantile contract for the supply of goods is always assignable unless it is expressed to be personal; *Tolhurst v. Associated Portland Cement Manufacturers* (L.R. [1903] A.C. 414). Here there is nothing restricting the benefit of the contract to G. H. Kemp. The words "that he shall require for manufacturing purposes" mean "that shall be required at Annette Road." To limit the quantity (to be supplied) by reference to his personal requirements is to read into the contract something which is not there.

And the plaintiffs are entitled to damages for the non-supply to the bakery at Brewery Road. What difference does it make whether the business was carried on at Martineau Road or at substituted premises?

¹ [EDITOR'S NOTE. For it must be remembered that, though the benefit of a contract is often assignable, yet "neither at law nor in equity can the burden of a contract be shifted off the shoulders of a contractor on to those of another person, without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else. This can only be brought about by the consent of all three." *Per Collins, M.R.*, (L.R. [1902] 1 K.B. at p. 668).]

LORD ALVERSTONE, L.C.J. The plaintiffs could not claim to have a supply for the Brewery Road business; for Kemp never carried on business there, and consequently never had any "requirements" for that business....

FARWELL, L.J.... This agreement contains two considerations moving to the defendant; one being the payment of the price, and the other being Kemp's undertaking not to purchase eggs from any other merchant. It is obvious that the value of the latter consideration must in a large measure depend upon the person who gives the undertaking, and the business carried on by him; and to that extent the personal element enters into the question. Secondly, as regards payment, it is conceded that novation cannot be compulsory so as to make the person supplying the goods accept against his will the liability of another person to pay for them, in substitution for the liability of the original purchaser; so that in that respect also the contract is personal. And, thirdly, the contract contains a personal element in that the quantity to be supplied is measured by the requirements of Kemp himself. When he assigned his three businesses to the new company, one of them was given up and a much larger business taken in its place. That fact brings into prominence the importance of the provision in clause 1 that the defendant shall supply to Kemp as many fresh eggs as "he shall require for manufacturing purposes." The requirements of Kemp for manufacturing purposes are one thing, and the requirements of anyone to whom Kemp may assign his business are another.... I do not find here anything to indicate that the supply was to be measured by the requirements of the business at a particular specified place; as was found to be the case in *Tolhurst's Case*. I cannot read clause 3 as in any way limiting the generality of clause 1. For the object of clause 3 was simply to specify the extent to which the cost of carriage of the goods was to be borne by the vendor. In my opinion the benefit of this contract was not assignable; and the appeal of the defendant must consequently be allowed.

[EDITOR'S NOTE. Thus wherever personal considerations enter into an executory contract—as by the one contractor's putting confidence in the other's personal skill or personal position in commerce—the latter cannot assign the contract and thereby take away from the former the peculiar advantage which he expected. Publishing agreements between a bookseller and an author have afforded instances of this; see *Griffith v. Tower Publishing Co.* (L.R. [1897] 1 Ch. 21).]

COUNTY HOTEL AND WINE CO. LD. v. L.N.W. RY. CO.

NISI PRIUS. 1918.

L.R. [1918] 2 K.B. 251.

[*May not a contract be assigned even after a breach of it?*]

[This was an action, tried before McCardie, J. without a jury, to recover damages for the breach of a contract in a lease of the site for an hotel adjoining Carlisle railway-station. By that lease, in 1853, the lessors (now represented by the defendant company) covenanted that the occupier of that hotel should "have the option of renting the refreshment-

rooms at the said station at the rent and subject to the rules and regulations to be from time to time fixed by the committee for the management of the station, in preference to any other party." In 1866 the lessee, Mr Head, assigned his lease to the plaintiffs. In March, 1916, the defendants gave to the plaintiffs, who had long been tenants of the refreshment-rooms, a half-year's notice to quit them. In July the plaintiffs gave notice to the defendants of their wish to exercise their option under the lease. On October 16, 1916, the plaintiffs obtained from Head's executors a written assignment of "all interest (if any) then remaining outstanding, or otherwise vested in them, of and in the railway obligations." Written notice of this was given to the defendants. The present action claimed a declaration that the defendants were bound to let the occupier of the hotel occupy the refreshment-rooms. The arguments of counsel are not reported. Several points were discussed, at the bar and in the judgment, with only one of which the present summary is concerned.]

MCCARDIE, J....[After holding (1) that the option clause did not run with the land, but (2) was assignable, yet (3) was not included in the words of the assignment of 1866, he proceeded.] It is admitted by the defendants that (apart from the question of champerty) the deed of October 16, 1916, constitutes a complete and effective assignment of the benefits of the option clause contained in the deed of 1853. But the defendants contend that the assignment of 1916 is a mere transfer of a right to damages and therefore champertous and void. This raises a question of general importance as to the power to assign causes of action. Champerty in the original sense was the maintenance of an action in consideration of a promise to give to the maintainer a share in the proceeds thereof. It was a branch of the general law of maintenance. The doctrine of champerty was, however, extended to cover the purchase of mere rights of litigation even though no actual maintenance was contemplated. It has been said that the purchase of a mere right of litigation is void: see *Prosser v. Edmonds* (1 Y. & C. 481), and *Hill v. Boyle* (L.R. 4 Eq. 260)...I can well understand that causes of action strictly founded on tort, for example, libel or assault, should not, on grounds of public policy, be assignable. So, too, there are contractual causes of action of a particular character, for example, breach of promise of marriage, which may not, for obvious reasons, be assignable....I can see no reason why damages for breach of contract should not in some cases be capable of assignment without infringement of the public interests. Take, for example, a case where the contract admittedly fixes the damages for breach at a liquidated sum and provides that it may be sued for as a debt. What reason of public policy should prevent the assignment of such sum if public policy permits the assignment of a disputed debt? The whole law upon the matter requires broad juristic consideration and decision by an appellate tribunal in the light of modern circumstances...

In the present case I am of opinion that the assignment of October 16, 1916, was in no way infected with champerty. I summarize my reasons as follows: (a) That the assignment is of a right of property, namely, the option clause, (b) That a defendant cannot destroy the assignability of

right of property, whether it be a contract or other form of property, committing a breach of contract by repudiation prior to the assignment....Even if the defendants had in fact repudiated their obligations, the plaintiffs clearly had not accepted such repudiation. This is obvious from the correspondence, and from the relief claimed in the writ and statement of claim. Even if the defendants had repudiated their obligations and the plaintiffs had accepted such repudiation, I am of opinion that under the circumstances of the case the assignment was valid. For it was an assurance of rights or claims which, through inadvertence only, had not previously been effectively assigned. I think that the position and status of the assignees was such as would call for rejection of the plea of champerty; in view of such decisions as *Williams Protheroe* (5 Bing. 309), *Earle's Shipbuilding and Engineering Co. Atlantic Transport Co.* (43 Sol. J. 691), and *Defries v. Milne* (L.R. 1913] 1 Ch. 98).

[He, however, held the option clause itself to be void for two reasons: as being *ultra vires*, and as being (in eight particulars) so vague as to be void for uncertainty.]

Judgment for defendants.

[EDITOR'S NOTE. The Court of Appeal confirmed this judgment; but on a new ground, viz. that the clause only gave a preference *in case* the railway company, instead of themselves occupying the refreshment-rooms, proposed to let them; and did not bind the company to let them. Hence (though they were clear that the clause was *not* void for uncertainty) it became unnecessary for the Court to pronounce any opinion as to the question of Assignability; (L.R. [1917] 2 K.B. 29). That question cannot yet be regarded as settled authoritatively.]

THE END

Author Kenny, Courtney Stanhope Law
Eng
K3688sf
Title A selection of cases illustrative of the
law of contract.

University of Toronto Library	
DATE	NAME OF BORROWER
7/25/51	Mend
8/37	W. J. H. H. H.
12/31	G. O. Reilly, et al.
12/44	A. E. Hawkins, et al.
B. T. odma	

Acme L.S. Card Pocket
LOWE-MARTIN CO. LIMITED